

No. 11567

United States
Circuit Court of Appeals
For the Ninth Circuit.

SHEVLIN-HIXON COMPANY, a corporation,
Appellant.
vs.

GALINA M. SMITH,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

JUN 27 1947

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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In the District Court of the United States
For the District of Oregon

Civil Action No. 2391

GALINA M. SMITH,

Plaintiff,

vs.

SHEVLIN-HIXSON COMPANY, a Corporation,
Defendant.

PRETRIAL PROCEEDINGS

This cause came on regularly for pretrial before the Honorable James Alger Fee, District Judge, on the 22nd day of May, 1944, Plaintiff was represented by Harry George and Emerson Sims, her attorneys, and Defendant was represented by J. C. Veazie, its attorney.

Based on the proceedings had at said pretrial hearing,

It Is Ordered that the following matters are admitted as to the issues framed by the complaint herein and the answer to the complaint.

I.

This is an action brought under and by virtue of the Employers' Liability Act of the State of Oregon (Sec. 102-1601 O.C.L.A. 1940), which requires, among other things, "all owners, contractors or sub-contractors or other persons having charge of, or responsible for, any work involving

risk or danger to employees or the public, to use every device, care and precaution which is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliances and devices." [7*]

II.

The parties have entered into the following stipulation of facts which have been agreed to be the facts on which this action is based:

1. That the defendant, Shevlin-Hixson Company, is a Delaware corporation and, therefore, a citizen of that state. The plaintiff is a citizen of Oregon, and the amount in controversy, exclusive of interest and costs, exceeds \$3,000.

2. That defendant operates, among other things, a box factory where many power-driven machines are employed, at Bend, Oregon, where it employed the plaintiff between the dates of October 26, 1942, to August 24, 1943. That said box factory is an integral part of a large lumber manufacturing plant in which much power-driven machinery is used.

3. That on May 15, 1943, and for some time prior thereto, plaintiff had been directed and assigned to do "punking" work—that is, grading, sorting and stacking, behind a hi-cut-off saw.

* Page numbering appearing at foot of page of original certified Transcript of Record.

4. That plaintiff's place of employment was a space approximately 3 feet square surrounded on three sides by tables, the tops of which were approximately 33 inches from the floor, the exact height being in disagreement and set out more particularly in paragraph 2, page 3 herein, the fourth side being rolls approximately the same height from the floor. That in said room and said box factory were eight hi-cut-off saws, a number of ripaws and resaws, all being power-driven machinery and, in addition thereto, moving rolls. That plaintiff was required to and did work within arm's length of the rolls and hi-cut-off saws and was required to pass by and work near the other operating power-driven machinery daily during the course of her employment.

5. That the hi-cut-off saw was located approximately 2 feet above the tables surrounding plaintiff on the end [8] and opposite the rolls. Here the sawyer took lumber from a bin or stall behind him and sawed it into short lengths, which he slid down to the table where plaintiff was working. Plaintiff then sorted the cut lumber and, after stacking it, placed it on the rolls which carried it away.

6. That the company operated eight or more such cut-off saws located one to each stall, side by side.

7. That an overhead cat-walk with descending stairs allowed the sawyers to get to their machines.

8. That as soon as the sawyer finished all of the lumber in one bin, he, together with his "punk" or "grader," moved to the next machine.

9. That there were four sawyers working at the same time the night of the accident.

10. That the company operates a day shift and a night shift; the night shift starting at 5:00 p.m. and ending at 1:30 a.m. That plaintiff was employed on the night shift.

11. That the night foreman was Guy Smith.

12. That the sawyer with whom plaintiff worked was Edward Leacock.

13. That on May 15, 1943, plaintiff was taken at the direction of Guy Smith, foreman, by Norval Hufstader in his automobile to the Lumbermens Hospital, with an injured knee.

It Is Further Ordered that the contested issues to be submitted to the Court for determination in connection with the issues framed by this pretrial are as follows:

1. That plaintiff contends that the rolls were live rolls. Defendant denies this and contends that they were operated solely by gravity.

2. Plaintiff contends that tables she had to go over were 36 inches from the floor. Defendant denies this and contends that tables were only 33 inches from the floor.

3. Plaintiff contends that prior to May 15, 1943, [9] she lost no work because of any complaint connected with her knee and had not lost more than two days since she started working for the company. Defendant denies this.

4. Plaintiff contends she was working behind No. 3 cut-off saw, and, finishing, moved to No. 4

cut-off saw, where she was injured. Defendant contends she was working in No. 5 at the time she contends she was injured.

5. Plaintiff contends that the only means of entrance into her place of employment was to come down the cat-walk, crawl over a rail to the table, and then jump from it to the floor or crawl over the rolls. Defendant contends she could have walked into her place of employment on the floor level or entered either under or over the rolls or could have descended safely without jumping.

6. Plaintiff contends that a ladder, stairway, or a redesigning of the operational set-up could have been used without impairing the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliances and devices, which would have permitted a safe means of entering her place of employment and not required her to jump down 33 to 36 inches to said place of employment. Defendant denies this and contends there was a safe means of entry that she could have used. Defendant admits, however, that on or about April 17, 1944, the rolls were removed from the rear of the inclosure plaintiff had been required to work in, and a moving belt placed under the front table, which left the rear of said inclosure open.

7. Plaintiff contends that on May 15, 1943, when she jumped from the table top to the floor to begin work, she suffered a fractured bone and semilunar cartilage and other damage thereto, the exact nature and extent of which is unknown to the plaintiff, of

her right knee, together with torn and wrenched ligaments of said knee. Defendant denies that she jumped, as alleged, and contends that she was not injured at all on May 15, 1943, that she had no fractured semilunar cartilage or wrenched knee, or other injury thereto which [10] was sustained by plaintiff in its said box factory, and that, if she did jump, it was her own negligence.

8. Plaintiff contends she was damaged in the sum of \$7,400. Defendant denies this.

9. Plaintiff contends that because she was employed in a box factory or sawmill, that because she was required to and did work close enough to touch the moving rolls and dangerous hit-cut-off saw blades, and that by reason of being, during the course of her daily employment, required to be near and about the various other power-driven rip-saws and resaws, that by reason of the means of ingress and egress to her place of employment, that because during her working hours she was subjected to the dangers and hazards thereof, and that because of the nature of such employment generally, that her said work which she was required to perform was one involving risk and danger to the employees and to the public, and particularly to herself, within the meaning of the Employers' Liability Act of the State of Oregon. This contention of the plaintiff's is denied by the defendant and defendant denies that any risk or danger referred to in or within the interpretation of the Employers' Liability Law of the State of Oregon caused or in any

way contributed to the injury plaintiff claims to have suffered, or any injury to her.

EXHIBITS

At the pretrial the following exhibits were introduced, subject to objection by either party, it being understood that these are in addition to the exhibits submitted at the time of taking the depositions and now in custody of the court:

Plaintiff's Exhibit No. 12—Statement of income.

Plaintiff's Exhibit No. 13—Depositions taken at Bend, Oregon.

Plaintiff's Exhibit No. 14—Memo of final wage payment.

Plaintiff's Exhibit No. 15—Picture of plant.

Plaintiff's Exhibit No. 16—Statement of Fern E. Boughton.

Plaintiff's Exhibit No. 17—Statement of Hope H. Clark.

Plaintiff's Exhibit No. 18—Statement of W. T. Curtis.

Plaintiff's Exhibit No. 19—Statement of Frances Hastings.

Plaintiff's Exhibit No. 20—Statement of Shirley Hastings.

Plaintiff's Exhibit No. 21—Statement of Clara R. Long.

Plaintiff's Exhibit No. 22—Statement of Anna Belle McGrady.

Plaintiff's Exhibit No. 23—Statement of Beth R. Norton.

Plaintiff's Exhibit No. 24—Statement of Mae Arthur Welch. [11]

Defendant's Exhibit No. 25—Engineer's drawing.

Defendant's Exhibit No. 26—Pictures.

Defendant's Exhibit No. 27—Pictures.

Defendant's Exhibit No. 28—Pictures.

Defendant's Exhibit No. 29—Pictures.

Defendant's Exhibit No. 30—Time sheet.

Defendant's Exhibit No. 31—X-ray picture.

Defendant's Exhibit No. 32—X-ray picture.

Plaintiff's Exhibit No. 33—X-ray picture.

Plaintiff's Exhibit No. 34—X-ray picture.

Based upon the hearing before this Court, and the Court being advised in the premises,

It Is Ordered that the foregoing constitutes the pretrial order in the above-entitled action and that the foregoing order supercedes the pleadings, and said pretrial order shall not be amended in the trial except by consent or by order of the Court to prevent manifest injustice.

Dated this 1st day of November, 1944.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Nov. 1, 1944. [12]

In the District Court of the United States
For the District of Oregon

Civil No. 2391

GALINA M. SMITH,

Plaintiff,

vs.

SHEVLIN-HIXSON COMPANY, a Corporation,
Defendant.

VERDICT

We, the jury, duly impaneled and sworn to try the issues of fact in the above-entitled cause in the above court, find our verdict in favor of the plaintiff, Galina Smith, and against the defendant Shevlin-Hixon Company, a corporation, and assess plaintiff Galina Smith's damages in the sum of \$5900.00.

Dated at Portland, Oregon, this 5th day of December, 1946.

/s/ BARNEY CABLE,
Foreman.

[Endorsed]: Filed Dec. 5, 1946. [13]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND IN THE ALTERNATIVE AS A MOTION FOR A NEW TRIAL

Comes now the defendant and moves the Court for judgment in its favor, notwithstanding the verdict returned by the jury, on the grounds and for the following reasons:

1. That there is no competent evidence on which a jury could find a verdict in favor of plaintiff;

2. That it appears as a matter of law, that there was no violation of the Employers' Liability Act, which was the proximate cause of plaintiffs' alleged injury;

3. That it appears affirmatively from the evidence that plaintiff was not injured by reason of any machinery, electricity or absence of any safeguards to the same, but was injured, if at all, by reason of jumping from a sitting position from a table 33 inches in height, and there is nothing inherently dangerous in such a table, or in jumping from a sitting position from such table, but on the contrary a table of such dimension is something common to all and is in ordinary general use, and jumping from a sitting position from similar tables is done thousands of times daily in homes, offices and factories, and such a movement in descending from a table of this ordinary height offers nothing as a matter of law which could be said to be inherently dangerous;

4. That there was a complete failure of proof

by the plaintiff that she was required to jump while in a [14] standing position from the top of the table to the floor, the only evidence being that she was in a sitting position on the table and then jumped to the floor;

5. That there is no competent medical evidence that the plaintiff received the injury to her knee as alleged in her complaint and as contended by her in the pretrial order, but on the contrary the medical evidence is based upon hypothetical questions which were absent from the case and which were never developed by way of evidence in the case, and there is a complete hiatus between the hypothetical questions and the evidence produced;

6. That there is no competent medical evidence in this case sufficient to support a verdict by the jury in favor of the plaintiff, as the medical testimony is hypothetical and is based upon the possibility of an injury occurring, rather than the legal test of probability that an injury occurred, and, as shown by plaintiff's medical expert, he had no history, knowledge or information as to the distance plaintiff was supposed to have jumped, and no competent medical testimony was produced by plaintiff that a mere jump from a sitting position off the table would have probably produced the injury of which she complains.

7. It appears from the evidence that plaintiff's knee condition could be the result of one of two or more causes, and the jury in its verdict was required to speculate and conjecture as to which of

two or more causes brought about plaintiff's condition.

8. That the jury's verdict is against the law and the evidence.

VEAZIE, POWERS & VEAZIE,
Attorneys for Defendant. [15]

I hereby certify that the foregoing Motion for Judgment Notwithstanding Verdict in my opinion, is well founded in law.

/s/ JAMES ARTHUR POWERS,
Of Attorneys for Defendant.

Due service of the foregoing Motion by receipt of a duly certified copy thereof, in Multnomah County, Oregon, on the 12th day of December, 1946, hereby is accepted.

/s/ JOHN F. CONWAY,
Of Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 12, 1946. [16]

In the District Court of the United States
For the District of Oregon

Civil No. 2391

GALINA M. SMITH,

Plaintiff,

vs.

SHEVLIN-HIXON COMPANY, a Corporation,
Defendant.

JUDGMENT

This cause having come on for trial on December 3, 4 and 5, 1946, before the Hon. Claude McColloch, a Judge in the above-entitled court, in the above-entitled cause, plaintiff appearing in person and by E. U. Sims, John F. Conway and Harry H. George, Jr., her attorneys, and the defendant appearing by James Arthur Powers, of the firm of Veazie, Powers and Veazie, its attorneys, whereupon a jury was duly and regularly impaneled and sworn to try said cause, and after hearing the testimony and evidence of plaintiff and her witnesses and testimony and evidence of the defendant's witnesses, in said cause, and after both parties had rested, said cause was thereupon submitted to a jury after arguments of respective counsel and instructions by the Court and the jury retired to consider its verdict and thereupon and on the 5th day of December, 1946, the jury returned a verdict into Court, which verdict, omitting the title of the cause, was in words and figures substantially as follows:

“We, the jury, duly impaneled and sworn to try the issues of fact in the above-entitled cause in the above court, find our verdict in favor of the plaintiff, Galina Smith, and against the defendant, Shevlin-Hixon Company, a corporation, and assess plaintiff Galina Smith’s damages in the sum of \$5,900.00.

“Dated at Portland, Oregon, this 5th day of Dec., 1946.

BARNEY CABLE,
Foreman.” [17]

And said verdict having been duly and regularly received and entered of record and this cause now coming on for judgment based upon said verdict;

It Is Now Hereby Ordered and Adjudged that the said plaintiff, Galina M. Smith, shall have and recover a judgment against the said defendant, Shevlin-Hixon Company, a corporation, for the sum of \$5,900.00 and for plaintiff’s costs and disbursements herein, taxed and allowed at \$541.62.

And after argument of respective counsel, and the Court being now fully advised, It Is Further Ordered that the motion of said defendant for a directed verdict in its favor against plaintiff, made at the last trial of this cause on December 4, 1946, be and it hereby is denied and overruled in all respects;

And, after argument of respective counsel, and the Court being now fully advised, It Is Further Ordered that the motion of said defendant for a Judgment Notwithstanding the Verdict and in the

alternative as a motion for a New Trial made on December 12, 1946, be and it hereby is denied and overruled in all respects.

Done in open court this 24th day of December, 1946.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed Dec. 24, 1946. [17-a]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Galina M. Smith, the above-named plaintiff;
and

To: John F. Conway, Harry H. George, Jr., and
Emerson U. Sims, her attorneys:

Notice Is Hereby Given that the Shevlin-Hixon Company, a corporation, the above-named defendant, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, and the whole thereof, entered in this action on the 24th day of December, 1946, and which judgment is now final.

VEAZIE, POWERS & VEAZIE,

By JAMES ARTHUR POWERS,

Of Attorneys for Appellant,
the Shevlin-Hixon Com-
pany, 611 Corbett Building,
Portland 4, Oregon.

Service of the foregoing, by receipt of a duly certified copy thereof, in Multnomah County, Oregon, on this 27th day of January, 1947, is hereby admitted.

/s/ JOHN F. CONWAY,

Of Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 27, 1947. [18]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The above-named defendant-appellant, upon its appeal herein, will rely upon the following points, to-wit:

1. That there is no competent evidence to support a verdict in favor of plaintiff;
2. That as a matter of law, there was no violation of the Employers Liability Act; that the matter complained of was not the proximate cause of plaintiff's alleged injury;
3. The trial court erred in failing to instruct the jury properly as to the law in regard to the Employers Liability Act with reference to the facts which the jury must find in order for said act to be applicable;
4. The trial court erred in refusing to hold as a matter of law that the activity in which plaintiff was engaged at the time of her alleged injury, in getting down from a sitting position from a 33-inch table, was not inherently dangerous;
5. The trial court erred as a matter of law in

failing to instruct the jury properly as to the measure of damages in this case;

6. The trial court erred as a matter of law in refusing to instruct the jury, as requested by defendant, that plaintiff could not recover for any injury or disability caused by traumatic arthritis, no claim having been made for traumatic arthritis;

7. That there is no competent medical evidence sufficient to support the jury's verdict in favor of plaintiff, in that the only medical testimony as to the cause of the injury is based upon hypothetical situations, not connected with the facts shown by the evidence; it appears from the testimony of plaintiff's medical expert that he had no history, knowledge or information as to manner, distance or height plaintiff jumped, or whether she jumped from a sitting position;

8. There is no competent medical evidence in this case sufficient to support the jury's verdict, in that plaintiff's medical testimony showed only possibility rather than probability of injury. The jury was required to speculate and conjecture as to which of two or more causes was responsible for plaintiff's alleged injury.

Dated at Portland, Oregon, this 4th day of March, 1947.

/s/ ALFRED C. VEAZIE,

Of Attorneys for Defendant-
Appellant.

State of Oregon,

County of Multnomah—ss.

Service of the within Statement of Points on

Appeal is hereby accepted in Portland, Multnomah County, Oregon, this 4th day of March, 1947, by receiving a copy thereof, duly certified to as such by Alfred C. Veazie, of Attorneys for Defendant-Appellant.

/s/ JOHN F. CONWAY,
Of Attorneys for Plaintiff-
Appellee.

[Endorsed]: Filed March 4, 1947. [22]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 29, inclusive, constitute the transcript of record upon the appeal from a judgment of said Court in a cause therein numbered Civil 2391, in which Shevlin-Hixon Company, a corporation, is defendant and appellant and Galina M. Smith is plaintiff and appellee; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said Court in said cause, in accordance with the said designation, as the same appears of

record and on file at my office and in my custody.

I further certify that I have enclosed a duplicate transcript of trial proceedings dated December 3, 4 and 5, 1946, and original exhibits 1 to 36, inclusive.

I further certify that the cost of comparing and certifying the within transcript is \$51.25 and that the same has been paid by appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 17th day of March, 1947.

[Seal] LOWELL MUNDORFF,
Clerk.

/s/ By F. L. BUCK,
Chief Deputy. [29]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Portland, Oregon, December 3, 1946, a.m.

Before: Honorable Claude McColloch,
Judge.

Appearances: Messrs. Emerson Urquhart Sims
and John F. Conway, Attorneys for Plaintiff.

Mr. James Arthur Powers (Veazie, Powers &
Veazie), of attorneys for Defendant.

Court Reporter: Ira G. Holcomb.

(A jury was selected to try the case. Thereupon, counsel for the plaintiff and defendant outlined the case to the jury.)

Mr. Sims: We would like to read certain depositions, in conformity with our stipulation.

Mr. Powers: I will be glad to help you.

Mr. Sims: Do you want to read the questions and I will read the answers?

Mr. Powers: It does not make any difference.

DEPOSITION OF J. D. DONOVAN, A
WITNESS ON BEHALF OF PLAINTIFF

(The deposition of J. D. Donovan was then read as follows:

“Q. What is your name and initials, Mr. Donovan? A. J. D. Donovan.

“Q. Mr. Donovan, just briefly, tell us what your duties are and what your work here in——

“A. I am a member of the Lumbermen’s Hospital Association down here. It is my business to operate a hospital to take care of the sickness and accidents that happen at other plants, Brooks-Scanlon and Shevlin-Hixon.

“Q. Was that your occupation and duty or employment for the last year?

“A. It has been for the last twenty-five or thirty years.

“Q. Right here in Bend, Deschutes County?

“A. Yes.

“Q. Do you have some records referring to Galina M. Smith? A. I do, sir. [2*]

“Q. May we have them, please?

“A. Yes, sir.

* Page numbering appearing at top of page of original Reporter’s Transcript of Record.

(Deposition of J. D. Donovan.)

“(Witness produced some X-rays and documents.)”

Mr. Powers: I will stipulate that the X-rays received in evidence at the last trial may go in without identification, your Honor.

Mr. Conway: The X-rays 1 and 2, are referred to here. What was the next item? Exhibit No. 3 is the hospital record, chart account and register.

Mr. Powers: That is right, No. 3.

Mr. Conway: Exhibit No. 4 is a hospital slip No. 601.

Mr. Powers: That is right, No. 4.

Mr. Conway: Exhibit No. 5 is a hospital report.

Mr. Powers: Hospital slip, that is right.

Mr. Conway: Exhibit No. 6 is a doctor's slip or report.

Mr. Powers: That is right.

Mr. Conway: Exhibit No. 7 is a hospital report, No. 713.

Mr. Powers: That is right.

Mr. Conway: Exhibit No. 8 is another hospital slip or report.

Mr. Powers: That is right.

Mr. Conway: Exhibit No. 9 is a hospital report.

Mr. Powers: That is correct.

Mr. Conway: Exhibit No. 10——

Mr. Powers: Well, that is another hospital report. [3]

Mr. Conway: Referring to Plaintiff's Exhibit No. 1——

(Deposition of J. D. Donovan.)

Mr. Powers: Excuse me just a minute. There is another one here, Exhibit No. 11.

Mr. Conway: Well, I don't find it here. Was that received in evidence?

Mr. Powers: Excuse me. That was a part of another matter. That is all, I guess. Go ahead.

(Reading of deposition of J. D. Donovan continued:)

“Q. Referring to Plaintiff's Exhibit 1 for identification, I will ask you if you know what this is, Mr. Donovan.

“A. Yes. This is an X-ray picture of Galina M. Smith's knee.

“Q. That is the right knee?

“A. I don't know. I couldn't tell you whether it is or not.

“Q. Likewise, I am handing you Plaintiff's Exhibit 2 for identification, and ask you if you know what that is.

“A. That is another view of Galina Smith's knee.

“Q. Handing you Plaintiff's Exhibit 3 for identification, I will ask you what that is.

“A. That is the monthly record kept in the hospital, of doctors' charges and diagnosis.

“Q. What does that show?

“A. That shows that the lady was treated in May for arthritis, and in June, bursitis, and in July for fracture of the semi-lunar cartilage and bursitis of

(Deposition of J. D. Donovan.)

the knee. She was treated for floating semilunar cartilage. [4]

"Q. What does 'A' indicate?

"A. Accident.

"Q. What does 'W' indicate?

"A. Under 'Doctor,' that indicates the initials of the doctor, Doctor Woerner.

"Q. The second page indicates what?

"A. The second page indicates that Dr. Woerner took care of Mrs. Smith in November, '42—'43 is this one, '42 is that one.

"Mr. Veazie: The one with November is '42, the other is '43.

"Mr. Sims: I wonder if you would have any objection to our withdrawing the part of the exhibit which refers to '42? It simply indicates she had a cold and went to the doctor.

"Mr. Veazie: I don't believe that is of any real significance in the case, but we would prefer if this could be kept together, for the safe of our records."

"Mr. Sims: Sure.

"Mr. Veazie: I would a lot rather it went in with the rest.

"Mr. Sims: All right.

"Q. (By Mr. Sims): And then, am I to understand where it says 'May—arthritis' that was apparently the diagnosis of some condition she had?

"A. Complained of at that time, undoubtedly.

"Q. And then again in June?

"A. Yes, undoubtedly what the doctor's diagnosis on what she complained of.

(Deposition of J. D. Donovan.)

“Q. What was the question mark about?

“A. He wasn’t sure it was arthritis or wasn’t, I imagine.

“Q. Is that in the handwriting of the doctor?

“A. No, that is in the handwriting of the nurse that makes that report out. The only handwriting you have in the doctors’ reports is on that blue slip.

“Q. I hand you Number 10 for identification. What is that?

“A. That is the original of the report made out that goes from the hospital to the company, for which the employee works, when they come in, and is a ticket to go see the doctor. This was one made out for Mrs. Smith, apparently, on August 9th, to go see Dr. Woerner. This was made out by Miss Lamar. Nature of illness was injury to right knee, reported previous month. This was a continuation of some other months.

“Q. I hand you Exhibit 4 for identification. Will you tell us what that is?

“A. That is the doctor’s hospital slip, which goes to the doctor, describing his diagnosis and charges for services.

“Q. That is on the stationery of the Lumbermen’s Hospital? A. Yes.

“Q. What did that record show? You can read it better than [6] we can.

“A. The record shows bursitis, with a question mark. The charge is \$20.50.

“Q. The date, please?

“A. The date is 5/16/43.

(Deposition of J. D. Donovan.)

“Q. That would be May 16th, 1943?

“A. May 16th, 1943, yes, sir.

“Q. I am handing you plaintiff's exhibit 5 for identification, and ask you to tell us what that is?

“A. Let me go back to this notice: an ‘S’ marked on this thing. That might puzzle somebody. With bursitis you could not call it an accident, so it was marked ‘S’ for sickness.

“Q. And the question mark as to what sickness?

“A. Question mark as to what sickness; the doctor wasn't sure what it was.

“Q. I am handing you Plaintiff's Exhibit 5 for identification, and ask you what that is?

“A. That is the copy of the original of the doctor and report, and the report kept in the hospital, and that goes to the company for whom the employee works.

“Q. In this case the employee was Galina Smith?

“A. Yes. It was issued to Galina Smith on May 16, '43; the nurse issuing it was Katherine Danwood.

“Q. Doctor——? A. Paul Woerner. [7]

“Q. And employer?

“A. Shevlin-Hixon Company, box factory.

“Q. What did the patient report at that time?

“A. Nature of illness—‘injured knee, hurt knee on pit, jumped into pit at box factory.’

“Q. Is it ‘job’ or ‘pit’—that first word?

“A. ‘Injured knee, hurt knee on job, jumped into pit at box factory.’ What the nurse put down

(Deposition of J. D. Donovan.)

there the girl told her—injured knee while jumping into the pit at the box factory.

“Q. At the bottom is what?

“A. At the bottom—‘Last day worked’—looks to me like second, fifteen—’43. Is that a ‘5’?

“Q. Yes, that is a five.

“A. Last day worked is May 15th. She worked until May 15th and got this ticket on the 16th.

“Q. Do those slips have the same number?

“A. Yes, ‘601’ they belong together, yes.

“Q. So they go together, covering what you have already told us. I am handing you Plaintiff’s Exhibit 6 for identification. Can you tell us what that is?

“A. That is the doctor’s slip, again, that the patient gets to see the doctor;—to Galina Smith, made out by Hilda Williams. She was at that time, she is not there any more; made to Doctor Woerner for Galina Smith, and it shows that there was a charge of \$25.25 for professional services, and [8] he has got a ‘fractured semilunar cartilage.’

“Q. That is under date of what?

“A. That is under date of June 7, 1943.

“Q. And——

“A. And this is marked here ‘Accident on the job.’

“Q. And Dr. Woerner.’

“A. Yes, Dr. Paul Woerner.

“Q. I am handing you Plaintiff’s Exhibit 7 for identification, and ask you——

“A. (Interrupting): That is part of the one

(Deposition of J. D. Donovan.)

I have, 713. This is a copy of the original that was kept in the hospital files, of reports made for accident or sickness happening to employees of either Brooks-Scanlon or Shevlin-Hixon Company.

“Q. That is a carbon copy of the original?

“A. Yes.

“Q. What does it show?

“A. Shows ticket issued to Galina Smith, June 7, 1943, by Dr. Woerner, issued by Hilda Williams, the woman aged 37; her address, 829 Delaware; worked for the company nine months. One child dependent. Date of injury 4/17/43; X-ray negative; hospital care, heat treatment; while working she jumped down to the floor and hurt her right knee. Last day worked 4/24/43.

“Q. Do you know how those dates got in there?

“A. I don't know. [9]

“Q. Referring to Plaintiff's Exhibit 8, I will ask you if you know what that is?

“A. This is something else again,—just another ticket the doctor issued July 2nd to Galina Smith. This was issued by Hulda Lamerest, nurse at the hospital; diagnosis on this seems to be fracture semilunar cartilage and bursitis of the knee.

“Q. Any question mark there?

“A. No question mark there, that I see.

“Q. Same doctor? A. Same doctor.

“Q. Handing you Plaintiff's Exhibit 9 for identification, which also bears Number 853, under date of July 2nd, what is that?

“A. That is a continuation to the report made out on each patient issued a ticket to see the doctor,

(Deposition of J. D. Donovan.)

—that works for either lumber company. Made to Mrs. Galina Smith on July 2nd, looks to me like, and this was one also made out by Hulda Lamerest, one of the nurses, to Dr. Woerner, to Galina Smith, age 37, 829 Delaware, worked for the company ten months. One son. Probable length of disability—question mark. Date of injury, May 15th. Nature of illness or injury—Injury to right knee. X-ray of knee negative as to fracture. While working on cut-off jumped in pit, strained knee. Last day worked,—May 22nd. [10]

“Q. I am handing you Plaintiff’s Exhibit 10 for identification, and ask you what that is?

“A. This is the original of the report that is issued to the company when a patient comes in and asks for a ticket to see a doctor. This was issued August 9th to Dr. Paul Woerner to Mrs. Galina Smith by Hulda Lamerest; age 37, box factory; worked for company then eleven months; date of injury May 15th; nature of illness—injury to right knee; Last day worked—May 20th.

“Q. That shows ‘date of injury—May 15th?’

“A. Yes, it shows date of injury, May 15th.

“Q. Do you know of your own knowledge when these dates are filled in in these?

“A. They are filled in at the time the ticket is issued to the patient.

“Q. I notice in referring to Exhibit 5—

“A. (Interrupting): Yes, I noticed that myself.

“Q. That is in blank? A. Yes.

(Deposition of J. D. Donovan.)

“Q. And I observe, as I think we all did or would observe——

“A. (Interrupting): Yes, I noticed that fact.

“Q. The carbon occurs to me to be rather clear in the two places, and I wondered if they could be inserted sometime after the 7th of June?

“A. I doubt that very much, because this, ‘Injured knee, hurt [11] on job, jumped into pit.’ What more probably happened,—a different nurse made this out. This nurse here and the Lamerest, are two you can pretty well depend on. This is a relief nurse, works occasionally sometimes, you don’t get the kind of reports you would like to have.

“Q. The date on this shows May 16th, that a record was made May 16th. A. Yes.

“Q. That she had hurt this knee, that she had jumped into the pit at the box factory?

“A. Yes.

“Q. Now, then, we have a record here indicating on the 7th of June——

“A. (Interrupting): That she was injured the 17th.

“Q. Injured—17th—of April? A. Yes.

“Q. I am wondering if that is an obvious inaccuracy, in view of your other records, and wanted to clear it up if it is.

“A. I am sure I would not know how to answer that question, because,—the first ticket was issued to her for injury—when was that?

“Q. You have it right before you.

“A. This here, this is the first one.

(Deposition of J. D. Donovan.)

“Q. Yes. The writing in that looks to me like it was in a different hand. Here is the slip you issued to the doctor,—referring to Exhibit 4 for identification?

“A. Yes. This here is by a different person than this.

“Q. Of course. But the ‘3’ here and the ‘3’ down here looks to me different. I am referring to Exhibit 7, where this 4/17 business appears.

“A. Yes.

“Q. You say those are different?

“A. Yes, the ‘3s’ look different, entirely.

“Q. So, rather obviously, somebody put that in later. I was wondering if you had any knowledge of that, yourself?

“A. No, I have no knowledge of that having been done, no.

“Q. Do you have any other records?

“A. No, that is all the records I have in the case.

“Q. You have no independent knowledge, yourself, of what treatment she got down there?

“A. No, no other, other than she had heat treatment, infra-red lamps, and so on.

“Q. In other words, she had passive treatment,—no claim of any surgery up there?

“A. No, nothing like that.

“Q. Your radiologist’s report on the X-ray indicates this knee, so far as demineralization,—it shows no evidence? A. No.

“Q. No arthritis, limping or——

“A. (Interrupting): No. [13]

(Deposition of J. D. Donovan.)

“Q. Of course the semilunar cartilage cannot show in an X-ray?

“A. I don’t think so. I have heard people say it can, but I don’t believe it.

“Q. As I understand it, this record you have brought, Mr. Donovan, includes all the Galina Smith records? A. Yes.

“Q. Even including in 1942 when she had a cold?

“A. Yes, that is the whole record of Galina Smith that I know anything about.

“Mr. Sims: I think that is all.”

“Cross-Examination

“By Mr. Veazie:

“Q. I notice that in these records—I won’t go through them completely—but in Plaintiff’s Exhibit 3, which I have in my hand, and which you will recognize, the right-hand column starts off—‘January—cold and bronchitis. February—cold; May—arthritis; June—bursitis,’ and so on. In those entries made in the right-hand column, indicating the nature of the illness or injury, what is the source of the information that is given there?

“A. The source of the information that is given there is the doctor’s diagnosis on the case, on the slips that come in, I imagine that is where that comes in. We don’t make the diagnoses.

“Q. It is information gained from the doctor?

“A. Yes.

“Q. Then take these other exhibits, of which

(Deposition of J. D. Donovan.)

Plaintiff's Exhibit 5 is an example, first here he says—where it says 'Nature of illness or injury,'—'Injured knee, hurt knee on job, jumped into pit at box factory.' What was the source of that information?

"A. That was from the patient herself.

"Q. That is her story?

"A. Oh, yes, that is. You notice down there on that thing, doesn't that say, in the recommendation on the statement?

"Q. In his or her own words?

"A. Yes, her own words, yes.

"Q. But in some places that is, information of that character is put under the heading of illness or injury, and sometimes it is put under the heading of patient's own statement, but I understand in all cases that was, in fact, the patient's statement?

"A. When the patient comes in and says:

 "'I want a ticket to see the doctor.'

 "'What's the trouble?'

 "'I had an accident.'

"You fill in down there how the accident happened, and there on the statement, if they come in say, 'I have a cold,' or pain in my knee, arthritis, headache, or I got the sniffles, [15] or what have you, they put that down, and it goes through that way.

"Mr. Veazie: I think that is all.

(Deposition of J. D. Donovan.)

“Redirect Examination

“By Mr. Sims:

“Q. As I understand it, the employee comes first to the hospital and then through the hospital or office is cleared as to whether he is an employee and entitled to go to the doctor? A. Right.

“Q. Then is when these blue slips are issued?

“A. Yes.

“Q. Which in effect is a certificate that—in this case—Galina Smith is an employee of the Shevlin-Hixon Company? A. Yes.

“Q. She gets this slip, and after she goes to the doctor and then this record that has been, as I understand it, executed in triplicate—I am referring now to the yellow slips?

“A. We start this thing like this—I will draw you a picture of this thing.

“Q. You will have to use numbers, using Plaintiff's Exhibits 6 and 7.

“A. Take these two, like that—the book is made like that, carbon under here, carbon under there, and—You be the [16] patient and come in.

“Q. All right. So that the Reporter will have this straight,—he has prepared three pieces of paper,—one Plaintiff's Exhibit 6, a blue sheet, number 1713; next, a white sheet that says at the top ‘Lumbermens Hospital,’ and in this particular case happens to be Plaintiff's Exhibit 10 for identification, and under that a long yellow sheet which is Plaintiff's Exhibit 7, and he has described it. For-

(Deposition of J. D. Donovan.)

getting the numbers,—this might be considered as a set and as illustrating, with me as a patient.

“A. I don’t happen to have one of those slips. The slip is brought to the hospital from the company.

“Q. I would bring it to you?

“A. Yes, you would bring it to me. All right, we take your name, that goes down here. What doctor you want to see? Now, in order to save a little time, if you will explain how the doctor is chosen—who chooses the doctor?

“A. The patients themselves. You come in.

“ ‘Hello, John, how are you? What’s the trouble?’

“ ‘I want a ticket to see the doctor.’

“ ‘What doctor do you want to see?’

“ ‘Like to see Dr. Woerner.’

“ ‘All right.’

“You fill that in. Then this carbon comes out.

“ ‘How old?’ [17]

“ ‘What department do you work in?’

“ ‘How long have you worked for the company?’

“ ‘Sickness or accident?’

“ ‘I hurt myself.’

“If it is an accident, we fill in up here: residence, how many dependents, wife, and so on. Go on down here, and ‘Nature of illness’ we put down.

“Q. You might read from it. What would she say when she first came in?

(Deposition of J. D. Donovan.)

“A. When she came in it started off like this, wanted a ticket to see Dr. Woerner. ‘Where do you work?’

“Q. This says 16th of May?

“A. Sixteenth of May. ‘How long have you worked for the company?’ ‘Seven months.’ Now, name of dependents. That was not put down here. ‘Probable length of disability.’ That is not down. ‘Date of injury’—that is not down here. ‘Nature of illness—Injured knee, hurt knee on job, jumped into pit at box factory.’ This record is taken down, like that. This was done by a nurse that isn’t on to making reports as good as she might be, I suppose. Then tear this off, and you take it.

“Q. By ‘this’ you refer to the blue slip?

“A. Yes, that goes to the doctor. This goes to the doctor later.

“Q. To the doctor? [18]

“A. No, the white slip goes to the company for which they work. This is kept in the hospital as a permanent record of the hospital.

“Q. All right, then, as I understand it, the company would have a duplicate of this slip which says, ‘May 16th, injured knee, hurt knee on the job, jumping into the pit.’

“A. Yes, they have slips of all these things.

“Q. I understand all employees of the Shevlin-Hixon mill are entitled to hospitalization, whether it is sickness or accident, at your hospital?

“A. Yes. That is, unless they reject it.

(Deposition of J. D. Donovan.)

“Q. And that is the mechanics of how the thing is done when somebody is sick or gets hurt on the job, as this lady was? A. Yes.

“Q. And this business through the hospital, comes, as I understand it, from these two mills, your hospital is for these two mills and their employees? A. Correct, sir.

“Mr. Sims: That is all.

“Recross-Examination

“By Mr. Veazie:

“Q. The two mills being Shevlin-Hixon Company and the Brooks-Scanlon Lumber Company?

“A. Correct. But one other thing,—in an emergency or anything like that, if somebody is injured and brought in to the [19] hospital we could not turn them away.

“Mr. Sims: No; that wasn't what I was getting at. I was straightening out this employer and employee matter.

“The Witness: Oh, yes.

“Mr. Sims: That is all.

“Mr. Veazie: That is all.”

Mr. Sims: We might stipulate that these exhibits might all go in evidence, without objection, so that we may hand them to the Clerk or the Court Reporter to have them marked. It would make it a more intelligible record if we used the same numbers. I wonder if we could do that? We will offer the exhibits in evidence.

(Two X-rays thereupon received in evidence and marked Plaintiff's Exhibit No. 1 and Plaintiff's Exhibit No. 2, respectively.)

(Two sheets, chart account and register, thereupon received in evidence and marked Plaintiff's Exhibit No. 3.)

(Hospital Slip No. 601 thereupon received in evidence and marked Plaintiff's Exhibit No. 4.)

(Hospital Report No. 601, dated 5/16/43, thereupon received in evidence and marked Plaintiff's Exhibit No. 5.) [20]

(Doctor's Slip No. 713 thereupon received in evidence and marked Plaintiff's Exhibit No. 6.)

(Hospital Report No. 713, dated 6/7/43, thereupon received in evidence and marked Plaintiff's Exhibit No. 7.)

(Hospital Slip No. 853, dated July 2, 1943, thereupon received in evidence and marked Plaintiff's Exhibit No. 8.)

(Hospital Report No. 853, dated July 2, 1943, thereupon received in evidence and marked Plaintiff's Exhibit No. 9.)

(Hospital Report No. 1029, dated August 9, 1943, thereupon received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Sims: In accordance with the stipulation of counsel, I would like to read the testimony of Dr. Paul Woerner, as given at the last trial.

Mr. Powers: All right.

PAUL WOERNER

The testimony of Paul Woerner, produced as a witness on behalf of the plaintiff, October 31, November 1-2, 1944, was thereupon read as follows:

“Direct Examination

“By Mr. Sims:

“Q. You are Dr. Paul Woerner, I believe? [21]

“A. Yes, sir.

“Q. And what is your business or profession?

“A. I am a physician.

“Q. And you are practicing I believe over at Bend? A. That is right.

“Q. Are you acquainted with Mrs. Galina Smith? A. I am.

“Q. Through the courtesy of the Bailiff, I am handing you Plaintiff's Exhibit, Pre-Trial Exhibit No.—I have no numbers on these but I am handing you certain instruments in writing. I will ask you to examine them and tell us if you know what they are. They should bear numbers 1 to 13, I believe, Doctor. Perhaps you will find the numbers that I did not find. Mr. Bailiff, would you hand these also to the Doctor, please.

“A. Yes. I know what they are.

“Q. You know what they are? A. Yes.

“Q. Referring first to your X-ray examination, I see that one of these is marked No. 1. Can you tell us what this is a picture of?

“A. Picture of a knee joint.

“Q. Right or left?

“A. Why, it is probably the right.

(Testimony of Paul Woerner.)

“Q. And do you know where that X-ray was taken? [22]

“A. That X-ray was taken at Lumbermen’s Hospital in Bend.

“Q. In Bend. And of whose knee?

“A. Of Mrs. Galina Smith.

“Q. And that would be the same answer to the X-ray No. 2?

“A. Yes, sir, that is right.

“Q. Did those X-rays disclose any bony fragments?

“A. I am not a specialist but I cannot see any.

“Q. Now then, if you will, refer to the two sheets that are charged against the registry there, they are marked Exhibit No. 3; what are they?

“The Court: I have Exhibit No. 4.

“Mr. Sims: We will pass No. 3 for now. What is Exhibit No. 4?

“A. It is Lumbermen’s Hospital ticket issued by the Lumbermen’s Hospital for medical services.

“Q. And at whose—what does that instrument disclose?

“A. Well, No. 4 discloses that I saw Galina Smith at her residence on May 17th.

“Q. Now with that to refresh your recollection, Doctor, will you tell us what you observed about the right knee?

“A. I called at her residence and her right knee was moderately swollen and painful.

“Q. And what treatment, if any, was administered at that time?

(Testimony of Paul Woerner.)

“A. Well, if you recall it right, I felt it might be arthritis and I took her to my office and gave her a diathermy treatment [23] and probably prescribed for her internally, although I do not recollect that.

“Q. Now will you refer to Exhibits Nos. 5, 6, 7, 8, 9 and 10, and I am asking you the same questions as to those? I realize I am hurrying this a little, Doctor, but I know you can take it.

“A. The next one is also a slip from the Lumbermen's Hospital authorizing medical care. At that time—let's see. I put on this 'Diagnosis. Fractured semilunar cartilage', with a question mark, 'and bursitis'.

“Q. What was the date of that?

“A. The ticket was issued on June 7th, but I saw her; at that time she was in the hospital. I saw her on Tuesday, the first.

“Q. How long did she remain in the hospital under your care, Doctor?

“A. Until she was released on June 10.

“Q. She was admitted on the——

“A. She was admitted in May. I advised her to go to the hospital in May; let me see; May 27th, and she remained at the hospital until the 10th of June, inclusive.

“Q. Were you there yourself all of this time, or did you refer her to Dr. Hosch during your absence?

“A. No. I was gone two or three days and Dr. Hosch took care of her when I was gone. [24]

(Testimony of Paul Woerner.)

“Q. And do you know what date or dates that was? A. I could not remember.

“Q. Are these your entries on the hospital slips in your handwriting? A. No.

“Q. Any of them?

“A. No; only on the blue slips.

“Mr. Veazie: On the blue slips?

“A. That is right. But not all of that.

“Mr. Sims: Q. What is your writing? That will clear that up, please.

“A. Well, this is not my writing. Oh, ‘Accident on the job’, it means. I see. That is not my writing.

“Mr. Veazie: Well then, I am probably wasting more time this way than I will be in reading Donovan’s testimony. Where did that information come from, that she had an accident on the job? Who gave you that information?

“A. Well, when any employee of five of the companies go to Lumbermen’s Hospital they give a deposition to the nurse.

“Mr. Veazie: That is, the patient gives a statement to the nurse?

“A. The patient gives a statement to the nurse what is the matter with him.

“Mr. Veazie: Is it agreed this statement regarding ‘Injury to the knee’, ‘Jumped into the pit’, and ‘Injury on the [25] job,’ that those are statements

(Testimony of Paul Woerner.)

by Mrs. Smith to the nurse or to the doctor? Will that be agreed to?

“Mr. Sims: I think that is right, your Honor. Yes. The plaintiff will be on the witness stand and we will ask her about it.

“Mr. Veazie: And as to these diagnoses, if the doctor could explain that I think we could introduce these without further attack.

“Mr. Sims: Very well. Mr. Bailiff, will you take these exhibits to Mr. Veazie, and let the witness see them:

“Q. Dr. Woerner, there was a question that Mr. Veazie just asked, and if you recall it you may answer it; otherwise we might ask it again.

“The Witness: What was that? What was the question?

“Mr. Veazie: I haven't got myself what the last question was. I was asking one thing that I would like to have made clear to the jury, is as to those notes on the right-hand side of that top sheet where it say 'Arthritis' or 'Bursitis', and eventually 'Fractured semilunar cartilage'. Who put that down and where the information came from?

“A. That was my own writing.

“Mr. Veazie: That is your writing?

“A. Yes, that is right. It is just a diagnosis. 'Arthritis', the question mark, and 'Bursitis', the question mark. That is my writing. [26]

“Q. (By Mr. Sims): There is one other thing,

(Testimony of Paul Woerner.)

Doctor. You said when you went to this house and found this thing was swollen, was it your opinion that she had sustained an acute injury?

“A. No. At that time, as I put down the diagnosis, I thought it was possibly an arthritis, which of course was an exuberation due to the stepping in the hole or pit.

“Q. Why did you put a question mark there?

“A. Because I was not sure.

“Q. What in your opinion was the matter with the knee?

“A. Well, later on she became very sensitive from her prepatellar bursa and no question had a bursitis come with some other trouble, and during my absence Dr. Hosch looked at her and he told me he definitely found a foreign body in her left knee, so I bow to the judgment of the surgeon and make a diagnosis, fracture of the semilunar cartilage. I never felt the cartilage myself.

“Q. Do these semilunar cartilage fractures repair very ordinarily?

“A. No. They can if you put them in at rest, but as a rule they remain due to the very little blood supply and cartilage is where there is no repair itself.

“Mr. Sims: You may cross examine.

“Cross Examination

“By Mr. Veazie: [27]

“Q. You say, Doctor, your original diagnosis was bursitis, was it not? A. That is right.

(Testimony of Paul Woerner.)

“Q. And what led you to the conclusion that that was her trouble, in the first place? You might explain for the benefit of the jury what bursitis means?

“A. Ask me as an expert witness?

“Q. Well, yes. You just tell the jury what your knowledge as a physician is, what the word bursitis means.

“A. Well, the bursa is a little sac like, and covered with what we call synovial membrane. It is located around the joints and tendons and helps to lubricate the joints and avoid friction and what have you? Now if a bursa becomes infected, either through trauma or through infection—both are possible. Trauma means—well, if you hit it or hurt it, or what have you, you become—that bursa becomes inflamed and painful, and that is what you call bursitis. I don’t know. I suppose that is about right.

“Q. Well, how is this for a crude expression: Bursitis means something like inflammation of the knee joint; is that right?

“A. No. No. Bursitis means inflammation of the bursa.

“Q. Of the bursa?

“A. Which, of course, you can have—there are many bursa around a joint, and all of them could be inflamed at one time but it still would be confined as bursa to the joint. [28]

“Q. Did the conditions you found at first in Mrs. Smith’s knee lead you to believe that she had bursitis?

(Testimony of Paul Woerner.)

“A. Yes. I thought that she had traumatic bursitis.

“Q. But you are not sure of that, and later you thought it might be arthritis?

“A. I thought that at first.

“Q. Yes. And you are not aware of, and I suppose did not suspect the presence of a broken semilunar cartilage until Dr. Hosch felt a foreign object in her knee? A. That is right.

“Q. Yes. Have you seen the later X-rays that were taken by Dr. McClure?

“A. I have not.

“Mr. Veazie: I do not intend to show them to the witness.

“Mr. Sims: I will hand them to the witness.

“Mr. Veazie: Thank you. That is all, Doctor.

“Redirect Examination

“By Mr. Sims:

“Q. Doctor, is a semilunar cartilage easy and ready to diagnose?

“A. Well, yes and no. As I mentioned, I am not an orthopedist or a surgeon but a few cases of semilunar cartilage fracture on this knee give much more pronounced symptoms, like much more swelling, fluid in the joint, and what have you, but it is very difficult to make a diagnosis of a [29] fractured semilunar cartilage except when one is fortunate enough, like Dr. Hosch was, to feel a foreign body.

“Mr. Sims: I think that is all, Doctor. Thank you.

“(Witness excused.)”

The Court: Ladies and Gentlemen, we will recess until two o'clock. Kindly do not discuss this case or permit it to be discussed in your presence until it is finally submitted. The audience, according to the usual custom, will remain seated until the jurors have retired. Return at two o'clock this afternoon, please.

(Thereupon a recess was taken until 2:00 o'clock P.M.)

(Court convened at 2:00 o'clock P.M. pursuant to recess.)

Mr. Conway: If your Honor please, I think we can get through with our witnesses and depositions and introduce the exhibits this afternoon, except that Dr. Chuinard, I understand, is tied up in his office this afternoon. We can put him on at ten o'clock in the morning, if it is agreeable to the Court. Otherwise, we will have to get him down here this afternoon, if your Honor so desires, around four o'clock. We don't know how long it is going to take for these other matters. [30]

The Court: You just go ahead and try your case just like any other case and we will take care of the doctor part of it when we get to it.

Mr. Conway: I did not want your Honor to think I was going——

The Court: He has you at a disadvantage, that it all. I have heard that hundreds of times.

Mr. Conway: I wanted you to understand it. All right. Thank you.

These exhibits, No. 1 to No. 10, I understand, were received in evidence this morning.

Mr. Powers: No objection.

The Court: Yes.

Mr. Conway: Then, we have here, your Honor, also Plaintiff's Exhibit No. 11, which is a medical report of Galina Smith, consisting of two sheets; No. 12, which is a statement of income tax for the calendar year 1943 paid to Galina Smith by Shevlin-Hixon Company; then No. 14, a memorandum of final wage payment for the period of time from August 16th to August 31st, Mrs. Smith's wages at Shevlin-Hixon Company; and No. 15, which is an aerial photograph of the Shevlin-Hixon mill at Bend, Oregon; No. 16 which is entitled "Index of Employees' Written Statements"—I am taking these as they come out of this file here—and No. 17, a statement signed by Fern E. Broughton, April 25, 1944. Then, there is [31] another exhibit, No. 19—

The Court: If you have agreed to put them all in, you don't need to go over them all now. They can take the same numbers as at the other trial.

Mr. Conway: I was just identifying them for the Reporter here.

The Court: They don't need to be identified. He will find your numbers and he will know the numbers to correspond.

Mr. Conway: May I show them to the jury, your Honor, at this time after the Clerk gets them identified?

The Court: Do whatever you want to.

Mr. Conway: Would you want me to do it now to save a little time?

The Court: Don't mind about the time. We are not in any hurry. They have got numbers on them now.

Mr. Conway: That is right, your Honor, but I might say in explanation of that that some of these have two numbers. One is a pre-trial number and then there is another number, which is the suit number.

The Court: The Clerk says they were not all put in at the trial.

Mr. Conway: Some of them are not. Some of them are pre-trial exhibits.

Mr. Powers: Are you putting something in that was not in at the last trial? [32]

Mr. Conway: I don't know. I am trying to put in the ones that were introduced at the other trial. That is the reason I was calling off the numbers here.

The Court: You lawyers will have to figure out what you are going to do with the exhibits. Do it any way you want to.

Mr. Conway: I just do not want to take the time before the jury now, but if it is agreeable to counsel——

Mr. Powers: We can do it during the recess, if you want to.

Mr. Conway: I could offer this group of exhibits which I have here and give you the numbers.

The Court: I don't want the numbers. They

don't mean anything to me. I think you had better wait and take it up between yourselves during a recess.

Mr. Conway: All right, your Honor.

The Court: You will get in a mess otherwise.

Mr. Sims: I would like now to read the deposition of Dr. Hosch.

Mr. Conway: This is the deposition of J. F. Hosch. Do you want to read this?

Mr. Powers: Was he produced as a witness for the defendant?

Mr. Conway: Yes.

Mr. Powers: I will read it. [33]

Mr. Conway: The questions will be read by Mr. Powers and I will read the answers.

J. F. HOSCH

The testimony of J. F. Hosch, produced as a witness on behalf of the defendant, at the trial October 31, November 1-2, 1944, was thereupon read as follows:

“Direct Examination

“By Mr. Veazie:

“Q. You are Dr. J. F. Hosch, are you not?

“A. Yes.

“Q. And what is your profession?

“A. Physician and surgeon.

“Q. How long have you been practicing?

“A. Over thirty-nine years.

“Q. And where are you practicing now?

“A. At Bend, Oregon.

(Testimony of J. F. Hosch.)

“Q. Yes. And how long have you been there?

“A. Twenty years.

“Q. Reference has been made in the testimony to an examination of Mrs. Galina M. Smith’s knee by you at Bend in the summer, I believe, of 1943. You did examine her, did you? A. I did.

“Q. And will you tell us, please, what you found at that time?

“A. I was called in to see the plaintiff, Mrs. Smith, in the absence of Dr. Woerner, who testified yesterday. It was merely a courtesy call. She was not my case, but I was pinch-hitting [34] for the doctor and went into her case briefly and she told me she had a knee that gave her trouble. I asked her about the knee and examined it. At that time I didn’t find anything but I told her—she said there was a lump or a foreign body coming in and out of her knees—to call me in when this was out. I think the next day she called me in and I found this foreign body of the knee protruding a little on the inside, right in the bight of the knee. I would judge this was about the size of a small hazelnut. I think I saw her a few times after that. I told Dr. Woerner, when he came in, what I had found and we made an X-ray of the knee but we didn’t find at that time any foreign body. I don’t think I have seen her or waited on her since that time.

“Q. Yes. An X-ray would not show a loose piece of semilunar cartilage, would it?

“A. It would not show a cartilage.

“Mr. Veazie: Yes. I will ask that the witness

(Testimony of J. F. Hosch.)

be shown now Exhibits 1 and 2, I believe it is, the X-rays that were taken there in Bend.

“The Court: Did he see her before or after the accident? A. After.

“The Court: He has not covered that in his testimony.

“Mr. Veazie: Oh, yes. Well, I will ask him to do so.

“Q. This was after the 15th of May, was it not, Doctor? [35] A. Yes.

“Mr. Veazie: Very well.

“Mr. Sims: He didn’t testify where he had seen her yet.

“The Witness: This was at the Lumbermen’s Hospital.

“Q. (By Mr. Veazie): In Bend?

“A. I happen to have this upside down.

“Q. Now that X-ray does not show any apparent body, does it, or as you can perceive?

“A. This is 2391. I don’t see anything in 2391 that would mean much to me. In the same manner on the other side there is a little opposite that could be a bony substance. That is all I can see on those two pictures.

“Q. In view of your finding of this foreign body in her knee, and in view of those X-rays, how did you diagnose her trouble at the time?

“A. Well, the first impression you get from a floating body in the joint, from our experience, which is general, and not as a specialist in the par-

(Testimony of J. F. Hosch.)

ticular line of bones of an orthopedist, that is really our first thought—a floating cartilage from a semilunar cartilage.

“Q. And was that your diagnosis of this, then?

“A. It was my guess. Feeling the foreign body to me didn’t mean anything but a foreign body. I could not tell from the feel of it whether it was bone or cartilage. That was merely the quick diagnosis at that time. [36]

“Q. Now will you show the doctor the X-rays taken by Dr. McClure. They have his name on the outside of the envelope.

“A. This is Exhibit 31, which shows a definite bony body of the thigh-bone or femur. That is entirely a foreign body—should not be there.

“Q. Could that be a piece of cartilage?

“A. It could not, because it is bony.

“Q. Yes. Does the other X-ray now in front of you show the same? I don’t know whether it does or not. You will have to say.

“A. Yes, it does definitely show the same body?

“Q. Yes.

“A. It happens to be on this side.

“Q. Now in view of these later X-rays what do you say as to the correctness of your original diagnosis that you had felt a piece of semilunar cartilage?

“A. Well, at the time, as I say, it was merely a foreign body. From what I have learned since then the information and the more complete knowledge, I would have to say that I would have to

(Testimony of J. F. Hosch.)

change my diagnosis; by the mere evidence of this picture alone it would show me that it was bony in place of cartilaginous.

“Q. Yes. Have you formed any opinion as to the probable origin of that bony particle? [37]

“A. I have not.

“Mr. Veazie: I think that is all.

“Cross Examination

“By Mr. Sims:

“Q. Doctor, are you sure that you did feel something in there when she was there at the hospital in Bend?

“A. As sure as a man could be.

“Q. And as a result of that, those X-rays were taken there at Bend to see if you could find it?

“A. Yes.

“Q. And those X-rays, as I understand your testimony, do not disclose any bony substance; is that correct?

“A. I could not find them at that time.

“Q. But you did feel something?

“A. Yes.

“Q. Is the bony substance that you see in these plates that were made a year later in such a position, if you know, that it would cause a locking of that joint?

“A. Any foreign substance could cause a locking of the joint.

“Q. The position that this is in, though, if it didn't move around?

(Testimony of J. F. Hosch.)

“A. Well, I don’t think it would cause a locking up there so much, but it could still interfere with the motion.

“Q. It would be painful, but it could not lock the joint in that position, could it? [38]

“A. Well, that is theoretical. Some people, with the least pain in the knee-joint, they are going to think it is locked whether it is locked or not. They are going to quit right there.

“Q. You heard Dr. Chuinard’s testimony that the pictures taken in Bend did not show any foreign substance, didn’t you? You were here, weren’t you? A. Yes.

“Q. And that if the substance had been there and easy to see at that time in his opinion these X-rays would have shown it? Do you agree with that statement?

“A. Well, I can’t account for the fact that they did not show and show it later. I am unable to say.

“Q. If, doctor, there was a semilunar cartilage fracture that did move around, and does move around, and that you really did feel it, and then later on this other foreign substance, this bony thing came loose, would that not be consistent with the X-rays that were taken there at the Bend hospital?

“A. That is quite a hypothetical question you are putting at me.

“Mr. Sims: That is right.

“The Witness: Would you state it again, please.

(Testimony of J. F. Hosch.)

“Mr. Sims: The Reporter will help us.

“(Last question read.)

“Q. Well, I would say that question could be answered, that [39] it was.

“Mr. Sims: I think that is all, doctor.

“Q. Well, there is one other thing: Will this knee ever in your opinion be a normal knee, surgery or no surgery?

“A. An operation should—it is easy to remove and she should practically get a good result.

“Q. If, as in the opinion of Dr. Chuinard, there is both damaged cartilage and then later developed this bony thing but on top of that a roughness there in the sides, the top of that femur, how would the surgery, removing that cartilage and this little bony fragment, improve the roughness of that socket—of the femur, I would call it?

“A. Well, the removal of the foreign bodies and the future irritation, which may be a factor and is a factor in this roughening, and then after they are removed with rest, manipulations, physiotherapy, massage, and so on, would have a tendency to build that up pretty well.

“Q. Well, will it ever be as good as it was before this experience, in your opinion?

“A. No, I don't think it would become perfect.

“Q. And would you say the reasonable value of hospitalization and the care by a specialist, an orthopedist, would be about \$400.00? Would you say that is a conservative estimate of the expense of that type of treatment?

(Testimony of J. F. Hosch.)

“A. Oh, \$400 I would say is a pretty good fee. That includes [40] the doctor and the hospital.

“Q. That is what I mean. A. Yes.

“Q. Would you say that is reasonable?

“A. Well, that is reasonable. That is good for me, too. Nobody is going to starve at that kind of work.

“Mr. Sims: I think that is all. Thank you.

“Redirect Examination

“By Mr. Veazie:

“Q. I may have misunderstood you, doctor. I thought you said on your direct examination that in that X-ray taken at Bend you did deduct something that might have been a foreign body. Is that correct, or am I wrong?

“A. I think, yes, it shows some calcification, but it seems to be much simpler than this bone I see in the second picture. I wanted to qualify that answer by saying that one series of pictures don't always locate anything. That is, they may not be so well taken; they may not be so well developed, and the position is often a factor in deciding. We often have to take a series of pictures before we find what we want.

“Mr. Veazie: Yes. That is all.

“Recross Examination

“By Mr. Sims:

“Q. Doctor, you examined Mrs. Smith before she went to work for Shevlin-Hixon, didn't you?

“A. Yes.

(Testimony of J. F. Hosch.)

“Q. And did you at that time flex these knees and examine her for strength and pain and that sort of thing?

“A. Well, this is rather a superficial examination and a general examination. We are not looking for defects of this kind. We do make a thorough checkup as to ordinary defects, but on her examination of her knee, I had the applicant move that knee, flex it, and noticed that there was no swelling about the knee, and that is about all I made at that time.

“Q. And there was no history, I believe, though, at that time, of any lameness or difficulty of the knees prior to her going to work for Shevlin-Hixon, was there?

“A. None that she told me about.

“Q. Yes. And did you observe any lameness, or anything of the kind? A. No.

“Q. When we took your testimony there in Bend, did you feel that in your opinion she had a loose internal semilunar cartilage?

“A. At the time, as I say, it was a foreign body and my diagnosis at that time was, I thought it could be or should be a cartilage.

“Q. Well, did you make this answer: ‘Well, we had an X-ray made, which was negative, but in examining her I probably examined her two or three times. At one time I found a [42] cartilage that was out, so I could definitely feel it. It slips in and out. You might have examined her a dozen times and not found it.’ Is that right?

(Testimony of J. F. Hosch.)

“A. I think that is my answer at that time.

“Mr. Sims: Yes. I don’t think of anything else. I know he wants to go back to Bend, so I have been keeping that in mind.

“Redirect Examination

“By Mr. Veazie:

“Q. Counsel has now opened up this thing of the examination when Mrs. Smith went to work for Shevlin-Hixon Company. Did you find in that examination any evidence of any previous accident that she had had?

“A. No, I did not. You mean to this knee?

“Q. No. About any other accident that she had had.

“A. If I had I would have put it in the examination record, and I don’t think there is any such evidence in the record.

“Q. Your record—you can refer to it if counsel is not satisfied. I think it appears in the deposition that you refer to heparotomy. What is that?

“A. Laparotomy.

“Q. Yes.

“A. That is an abdominal operation.

“Q. But that would not signify the existence of any accident?

“A. No. That was an operation. [43]

“Mr. Veazie: Yes. Very well. That is all.

“Mr. Sims: I think that is all, doctor. Thank you.

“(Witnessed excused.)”

Mr. Conway: We will read the deposition of
HOPE H. CLARK.

The testimony of Hope H. Clark, produced as a witness on behalf of the plaintiff, October 31, November 1-2, 1944, was thereupon read as follows:

“Direct Examination

“By Mr. Sims:

“Q. Mrs. Clark, I am going to be very brief with you. I believe you live in Bend?

“A. Yes, sir, I do.

“Q. And you are, I believe, a punk, employed at the Shevlin-Hixon Box Factory?

“A. I wasn't punk at this time.

“Q. Were you in May of 1943?

“A. Was I punking in May of 1943?

“Q. Yes. A. I believe so.

“Q. Do you know Galina Smith? A. Yes.

“Q. How long have you known her?

“A. About ten years.

“Q. And has she been crippled at any time prior to May of [44] 1943? A. No.

“Q. Do you know of your own knowledge whether or not——

“Mr. Sims: Strike that.

“Q. Do you know of your own knowledge how the punks got in and out of their working position in May of 1943, out of 3, 4 and 5?

“A. They went up over the catwalk and stepped over the step right onto the table and went down in, or else they went over the rolls.

“Mr. Sims: You may cross examine.

(Testimony of Hope H. Clark.)

“Cross Examination

“By Mr. Veazie:

“Q. I didn’t catch the last part of your answer.
Or else what?

“A. They went up over the catwalk and stepped there, went down the three steps and stepped there; and stepped right on the table and went down in, or those that crawled over the rolls.

“Q. Over the rolls? A. Yes, sir.

“Mr. Veazie: Well, that is all right.

“Redirect Examination

“By Mr. Sims:

“Q. Were the rolls power-driven rolls? [45]

“A. I don’t know.

“Q. Which was the safest method of getting in?

“A. Up over the catwalk.

“Mr. Sims: That is all. Thank you.

“(Witness excused.)”

Mr. Conway: I will now read the testimony of

LAURA SNODGRASS.

The testimony of Laura Snodgrass, produced as a witness on behalf of the plaintiff, October 31, November 1-2, 1944, was thereupon read as follows:

“Direct Examination

“By Mr. Sims:

“Q. You are Laura Snodgrass?

“A. That is right.

(Testimony of Laura Snodgrass.)

“Q. Whereabouts do you live, Mrs. Snodgrass?

“A. I live in Bend.

“Q. Do you know Galina Smith?

“A. Yes, I do.

“Q. About how long have you known her?

“A. Oh, around twenty years.

“Q. How often have you seen her through the years?

“A. Oh, I have seen her maybe at least twice a month anyway.

“Q. Have you visited in her home?

“A. I have been in her home lots of times. [46]

“Q. And she in yours? A. Yes.

“Q. And do you know of your own knowledge whether she was crippled prior to May of 1943?

“A. No, she was not.

“Q. And did you see her on the 16th or 17th of May, 1943, in Bend?

“A. Well, I don't know the exact date.

“Q. Well, was it within a day or two after she had come from the hospital, do you know? If you are not sure, why, you say no, that you don't know.

“A. Well, I saw her one day up town after she got hurt when she was going to the doctor.

“Q. And what was her condition then, as to whether—well, just what was her condition as you observed?

“A. Well, she was limping and she was going to the doctor for treatments for her knee.

“Q. Had she ever been ill prior to that time?

“A. Not to my knowledge.

“Mr. Sims: You may cross examine.

“Mr. Veazie: No cross examination.

“(Witness excused.)” [47]

Mr. Conway: I will now read the testimony of
FRANCES HASTINGS.

The testimony of Francis Hastings, produced as a witness on behalf of the plaintiff, October 31, November 1-2, 1944, was thereupon read as follows:

“Direct Examination

“By Mr. Sims:

“Q. I believe you are Mrs. Frances Hastings, are you not? A. I am.

“Q. Were you employed at the Shevlin-Hixon Box Factory in May of 1943? A. I was.

“Q. And what type of work did you do?

“A. Well, I did several things.

“Q. Did you ever work as a punk?

“A. Yes, I did.

“Q. And do you know whether the rolls that were used at 4 and 5 were power-driven rolls in May of 1943? A. Yes, they were.

“Q. They were what?

“A. They were power-driven.

“Mr. Sims: You may cross examine.

“Cross Examination

“By Mr. Veazie: [48]

“Q. When did you go to work there, Mrs. Hastings? A. In April, '43.

“Q. In April, '43? A. Yes, sir.

(Testimony of Frances Hastings.)

“Q. And you were doing punking work right after that, were you?

“A. Well, I worked there six weeks and I punked the last week I worked there.

“Q. Well, all right, sometime in April; and then you were there six weeks and punked for one week. And on any particular saw?

“A. Well, I punked on Number 3 cutoff, I am pretty sure.

“Q. Yes. And can you fix more accurately that week when you were doing that punking work?

“A. Well, the last day I worked there was the 29th of May, '43.

“Q. The 29th of May. And you had been punking then for a week?

“A. Well, just about a week.

“Q. Yes. Very well. And you say at that time the rolls were power-driven?

“A. They were.

“Q. Had you ever observed them prior to that time?

“A. Observed them prior to that time?

“Q. Yes; prior to the time when you worked there for a week on that cutoff saw?

“A. Well, I knew they were power-driven and they were dangerous, [49] and they seemed too dangerous to even attempt to go over, so I never even attempted to.

“Q. I mean, previous to the time when you were working with one of these cutoff saws, did you know anything about the rolls?

(Testimony of Frances Hastings.)

“A. Well, I didn’t work around the rolls much.

“Q. Except that one week?

“A. Except when I was on that one job.

“Q. Yes. And you were satisfied that at that time they were power-driven? A. Yes.

“Mr. Veazie: That is all.

“Redirect Examination

“By Mr. Sims:

“Q. Mrs. Hastings, you then—if you see certain things to go through, to go over, you then would get into this position?

“A. Well, the only way you could get in, you could go up the stairs and walk out on the catwalk and down the stairs and go over the railing and jump down onto the floor.

“Q. And about how much of a jump was it?

“A. Well, I should judge it was three feet, at least that you had to, or more.

“Mr. Sims: That is all.

“(Witness excused.)” [50]

Mr. Powers: Do you want to read the testimony of Galina Smith?

Mr. Conway: No. We have another witness here, W. T. Curtis.

W. T. CURTIS

The testimony of W. T. Curtis, produced as a witness on behalf of the plaintiff, October 31, November 1-2, 1944, was thereupon read as follows:

(Testimony of Frances Hastings.)

“Q. And you were doing punking work right after that, were you?

“A. Well, I worked there six weeks and I punked the last week I worked there.

“Q. Well, all right, sometime in April; and then you were there six weeks and punked for one week. And on any particular saw?

“A. Well, I punked on Number 3 cutoff, I am pretty sure.

“Q. Yes. And can you fix more accurately that week when you were doing that punking work?

“A. Well, the last day I worked there was the 29th of May, '43.

“Q. The 29th of May. And you had been punking then for a week?

“A. Well, just about a week.

“Q. Yes. Very well. And you say at that time the rolls were power-driven?

“A. They were.

“Q. Had you ever observed them prior to that time?

“A. Observed them prior to that time?

“Q. Yes; prior to the time when you worked there for a week on that cutoff saw?

“A. Well, I knew they were power-driven and they were dangerous, [49] and they seemed too dangerous to even attempt to go over, so I never even attempted to.

“Q. I mean, previous to the time when you were working with one of these cutoff saws, did you know anything about the rolls?

(Testimony of Frances Hastings.)

“A. Well, I didn’t work around the rolls much.

“Q. Except that one week?

“A. Except when I was on that one job.

“Q. Yes. And you were satisfied that at that time they were power-driven? A. Yes.

“Mr. Veazie: That is all.

“Redirect Examination

“By Mr. Sims:

“Q. Mrs. Hastings, you then—if you see certain things to go through, to go over, you then would get into this position?

“A. Well, the only way you could get in, you could go up the stairs and walk out on the catwalk and down the stairs and go over the railing and jump down onto the floor.

“Q. And about how much of a jump was it?

“A. Well, I should judge it was three feet, at least that you had to, or more.

“Mr. Sims: That is all.

“(Witness excused.)” [50]

Mr. Powers: Do you want to read the testimony of Galina Smith?

Mr. Conway: No. We have another witness here, W. T. Curtis.

W. T. CURTIS

The testimony of W. T. Curtis, produced as a witness on behalf of the plaintiff, October 31, November 1-2, 1944, was thereupon read as follows:

(Testimony of W. T. Curtis.)

“Direct Examination

“By Mr. Sims:

“Q. You are W. T. Curtis, I believe, and in 1943 you were employed at Shevlin-Hixon Box Factory; is that correct? A. That is right.

“Q. And what were you doing in May of 1943 there in the box factory?

“A. In May, 1943? Well, I couldn't say exactly but I was doing various jobs, running a rip-saw and various things they have to do.

“Q. And do you know Galina Smith? Did you know her then? A. Yes.

“Q. Did you see her in the evening of May 15th, 1943?

“A. Well, I don't know whether I did or not. I don't remember I did.

“Q. Well, did you see her the evening that she was brought back from the hospital?

“A. Yes, sir. [51]

“Q. And did you observe her condition?

“A. Yes, sir.

“Q. What was it?

“A. She seemed to be crippled in one leg.

“Q. Had she been crippled before?

“A. Not that I know of, no.

“Q. What did she do when she came back from the hospital that night?

“A. Well, she was punking for me, working with me for this rip-saw.

(Testimony of W. T. Curtis.)

“Q. Did she have to jump in order to get into the position of it? A. No.

“Q. What was the number there?

“A. The number of the saw?

“Q. Yes. Was it a high cutoff saw at all?

“A. No. It is a different saw altogether.

“Q. Well, how would they get into the working position there? A. Just walk up to it.

“Q. Just walk up to it? A. Yes.

“Q. There wasn't any table to climb over?

“A. No.

“Q. I see. And, well, you go ahead and tell now what she did when she came back from the hospital. You said she was [52] crippled. Now what did she do?

“A. Well, as I would present her lumber, she would take it away from the table and put it on a little truck and we would get a truckload. If we would have to move the truck away from the saw, change the trucks and——

“Q. Could she do that alone?

“A. No. As a rule, it takes two persons to do that. A good and strong one might do it but she wasn't able to do that that night.

“Q. How was the truck removed then? Who did that?

“A. Well, I pushed and then someone else, I don't remember who.

“Q. Did Mrs. Smith do any pushing on that truck? A. No.

(Testimony of W. T. Curtis.)

“Q. Do you remember whether the rolls were——

“Mr. Veazie: I didn’t catch the answer.

“Mr. Sims: I beg your pardon. Would you give us the answer, Mr. Person?

“The Witness: No.

“Q. Were those live rolls there at the high cut-off saws? A. Yes, I think they were.

“Mr. Sims: You may cross examine.

“Cross Examination

“By Mr. Veazie:

“Q. Her job, after she came back that night, was to take [53] boards from your rip saw and lift them over onto the truck? That was it, was it?

“A. Yes.

“Q. She was able to do that all right, was she?

“A. Well, seemed to be, yes, sir.

“Q. And how long did she continue to do that work?

“A. I don’t remember what time of night, or anything about it, but she finished the rest of the evening with me, after she come back from the hospital.

“Q. You don’t remember, though, what the hours were? A. No, sir.

“Q. What is your ordinary quitting time there on the night shift?

“A. One o’clock, I think; one-thirty. I don’t remember just when.

“Q. Then perhaps we can ascertain otherwise when she got back from the hospital to the box factory. You don’t remember that?

(Testimony of W. T. Curtis.)

“A. I don’t remember when she come back.

“Q. Yes.

“A. Well, in fact I didn’t know she was gone, because I wasn’t working with her.

“Q. Well, when did she start to work with you? Have you any idea as to the hour?

“A. After she come back from the hospital. [54]

“Q. All right. Do you know approximately what time that was? A. No, sir, I don’t.

“Q. No idea at all? A. No, sir.

“Q. And I understand you to say that ordinarily the moving of one of those trucks is a job for two persons? A. Yes, sir.

“Q. A woman does not undertake to do it even if she is in good health, I understand?

“A. Yes, sir; she does.

“Q. I beg pardon? A. She does.

“Q. Alone? A. No, sir.

“Q. But she has helped? A. Yes, sir.

“Q. A woman helps on the job if she is in good, sound, physical condition? A. That is right.

“Q. About these rolls, was there ever a time when they operated by gravity?

“A. Well, I couldn’t say.

“Q. You don’t know? A. No, sir.

“Mr. Veazie: That is all. [55]

“Redirect Examination

“By Mr. Sims:

“Q. When did you go to work there at this mill?

“A. I think it was April, ’42.

(Testimony of W. T. Curtis.)

“Q. I see. And to get back now to '43, how would these punks get in and out of their working positions by the high cutoff saws?

“A. Well, your girl there would go up these steps and over this catwalk, they call it, and step over and jump off into where they were.

“Q. I think that is all. Thank.

“(Witness excused.)” [56]

BETH NORTON

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sims:

Q. You are Beth Norton? A. I am.

Q. You live over in the Bend country, don't you? A. I do.

Q. Whereabouts were you living back in 1942 and 1943? A. The same place I am right now.

Q. Over in Bend? A. Yes.

Q. Were you employed at that time?

A. Pardon me?

A. Juror: Louder, please.

Q. (By Mr. Sims): As I have it in mind, you are a sort of a war wife. Your husband had been in New Guinea? A. Yes, he was.

Q. And you were working?

A. Yes, I was, at that time.

(Testimony of Beth Norton.)

Q. You were working while your husband was overseas? A. Yes.

Q. You worked, whereabouts?

A. Shevlin-Hixon Box Factory. [57]

Q. During the time you worked for the defendant, did you know Mrs. Galina Smith?

A. Yes, I did.

Q. Had you known her before? A. No.

Q. Did you know her at the box factory during that entire ten or eleven months that she was employed there? A. Yes.

Q. You saw her about how often?

A. Every day.

Q. Did you observe her as she walked and moved around prior to May when she says she was hurt?

A. Yes.

Q. Did she limp or have any defects as far as walking around was concerned?

A. Not that I could see.

Q. Did she develop any limping or "trick" knee or difficulty during the month of May?

A. After she was injured, she did.

Q. We are agreed that this occurred—the record shows that it was in May, 1943, so do not be troubled about the time, if that was the time. If it was May, 1943, that is the same time we are talking about when she developed this knee trouble. In other words, I am not trying to ask you if it was the 15th of May, 1943. I am trying to ask you if [58] you know whether that was the same time that she went

(Testimony of Beth Norton.)

to the hospital when she was hurt, that she developed this "trick" knee or knee trouble?

A. Well, I would say that it was.

Q. What were your duties at the Shevlin-Hixon Box Factory?

A. Well, I was called a relief woman.

Q. Well, would you elaborate on that? You tell us what your duties were as relief woman?

A. The relief woman goes around and takes the place of the girls as they take a ten-minute rest period.

Q. Did that require you, then, to work at all of these different pits? A. Yes, it did.

Q. Do you know how you were required to get in and out of these pits?

Mr. Powers: She should answer how she got in and out.

Mr. Sims: I will reframe it.

Q. How did you get in and out of these pits?

A. Walk up the stairway and onto the catwalk and down four or five steps to a lower catwalk and crawl out over the side on the steel table and jump to the floor.

Q. Did you sit down and gently slide off as Mr. Powers has indicated to the jury in his opening statement? Go up just as easy and then slide off real easy, like that (illustrating)?

A. No, I didn't. [59]

Q. How did you get in there?

A. Well, to sit down like and slide off onto the

(Testimony of Beth Norton.)

floor would be doing something. It just comes natural to jump off. You don't slide off.

Q. Were you the only relief woman? Were you required to move from place to place?

A. Well, yes. They have only just one relief woman at a time. However, if I was not present, there was another girl to take my place.

Q. On the night shift, would the punk have to move from one pit to the other?

A. Yes. Yes, they do.

Q. Would she get in in the same way, step over onto this table and then jump in? A. Yes.

Q. Do you know about how high these work tables were from the pit?

A. Well, I would say right about that (illustrating).

Q. Will you stand up and indicate to the jury about where that would strike you?

A. (Illustrating).

Mr. Powers: It is a little difficult to get that in the record.

Mr. Sims: I would estimate around three feet.

A. Around three feet. [60]

Q. Did you wear a belt or anything of the kind?

A. Yes.

Q. An apron?

A. Yes, wear a leather apron.

Q. Would that be worn at about the waist?

A. Yes, if you don't wear a leather apron you could not keep any clothes. The edge of the steel table would wear them out in any time at all.

(Testimony of Beth Norton.)

Q. Would you say that it would strike you about that spot (indicating)?

Mr. Powers: She has already made this indication. If she wants to step down, I think maybe she can show us.

Mr. Sims: If you will step down.

The Court: Don't you know the exact height?

The Witness: Thirty-three inches.

Mr. Conway: No, your Honor.

The Court: Would they vary?

Mr. Powers: They do not vary at all.

The Court: Wait a minute. One at a time.

Mr. Sims: I think they do.

The Court: I am talking to one of you at a time. I am talking to Mr. Sims.

Mr. Sims: These pits are not the same distance from the work table. I have yet to go into that.

The Court: I am going into it now. Don't you know [61] exactly what the height of the table was from the floor of the pit?

Mr. Powers: I think it was thirty-three inches.

The Court: Can't you agree? Don't you know? Do you mean to tell me that since this case was tried you people did not take any measurements of the table?

Mr. Sims: We took measurements. That is where we say it was.

The Court: We are talking about one pit. Let us not talk about any different pit. Your contention is going to be that where this woman got

(Testimony of Beth Norton.)

down this table was thirty-seven inches to the floor?

Mr. Sims: That is right.

The Court: What is your contention about that, Mr. Powers?

Mr. Powers: Thirty-three inches, your Honor.

The Court: All right. Go ahead.

Q. (By Mr. Sims): How was the floor of these pits covered?

A. Well, where you stand, on account of shifting back and forth, the floor wears, and they had replanked some of them.

Q. Were you around the evening of the 15th of May when she went to the hospital?

A. No, I was not.

Q. You were not there at that time?

A. No. [62]

Q. There has been some talk about rolls, whether they were gravity rolls or power-driven rolls. I do not care particularly about that, but do you know whether they were power-driven or gravity rolls?

A. They were power-driven rolls.

Q. What is the difference between power-driven rolls and gravity rolls?

A. Well, gravity rolls slant and you set your boards on them and they will carry those away. The power-driven rolls has a belt that runs underneath. They run at all times.

Q. As I understand, the power-driven rolls, one roll would be a little bit below the other. Let us say that these are the rolls here (illustrating). It would be somewhat in this fashion. I will try to get this

(Testimony of Beth Norton.)

a little lower, about in that situation. With the gravity rolls with the weight put on there, the gravity would make it slide along? A. Yes.

Q. But the power-driven rolls will be nearly level? A. Yes.

Q. And there will be a belt underneath pushing up against it and forcing the roll to turn, is that correct? A. That is right.

Q. Do I understand those rolls enclose and make the fourth side of that box or pit that you punks work in? A. The power-driven rolls? [63]

Q. Yes.

A. I would say about the same height as that steel table, approximately.

Q. About the same situation? A. Yes.

Q. Do you know how the women who worked as punks were dressed? How did you dress, for instance?

A. All of the girls wore slacks or overalls.

Q. That is what I mean. Was this room a heated room or a cold room? I want to know whether the temperature was——

A. You mean the place where we rested or the place we worked?

Q. I do not mean the rest rooms. I mean the place where you worked, punking.

A. Well, it was supposed to be heated.

Q. Was this steel covering on the work bench cold on a cold day? On a cold day would the steel be cold? A. Well, I hope to tell you.

Q. It would be cold? A. Very much so.

(Testimony of Beth Norton.)

Q. Did you see this mill about a month after the case was filed? The case was filed, I believe, in March. Did you see this mill in April?

A. Yes.

Q. Had they made any changes in this box factory? Particularly, now, I call your attention to the rolls. Was there [64] any change made?

A. I don't just definitely——

Q. Were the rolls removed?

A. I don't just definitely know when they removed them rolls, but they took them out over the week end and when we come to work on Monday morning no rolls were in there, power-driven rolls.

Q. How, then, is the material carried away from the front of the working place there when the rolls are gone?

A. Take them—take your boards off the steel cable, turn around and set them on the rolls, which carried them away.

Q. Where do you have to jump to get into working position now?

A. Well, you don't have to jump now. You can just absolutely walk right in there.

Q. It is right on the level?

A. Right on the level.

Mr. Sims: Dr. Chuinard is here. Mr. Powers has agreed that I might withdraw this witness and put the doctor on.

The Court: Yes.

(Witness temporarily excused.) [65]

DR. E. G. CHUINARD

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sims:

Q. You are Dr. E. G. Chuinard? A. Yes.

Q. What is your business or profession?

A. I am a licensed physician and surgeon in the State of Oregon, specializing in orthopedics.

Q. What is meant by orthopedics?

A. Orthopedics is described as a medical specialty that deals with disabilities and deformities of the apparatus of locomotion, which has to do with the muscles, nerves, blood vessels, bones and so forth.

Q. You were associated with Dr. Dillehunt, Dean of the Oregon Medical School, for many years?

A. Yes.

Q. And Dr. Lucas? A. Yes.

Q. And Dr. Buck and, who else?

A. Dr. Buck and various others.

Q. Your offices are in the Medical-Dental Building? A. Yes.

Q. What, if any, hospitals are you connected with here in [66] Oregon?

A. I am on the staff of the University of Oregon Medical School Hospital and Clinics, including medical and tuberculosis; the Doernbecher Hospital, the Portland Sanitarium, Emanuel Hospital, and Shriners' Hospital for Crippled Children.

(Testimony of Dr. E. G. Chuinard.)

Q. You are doing orthopedic surgery for crippled children at the Shriners' Hospital?

A. Yes, Dr. Lucas and I do work there.

Q. You have been doing that for several years?

A. Yes.

Q. This morning, you were in the Emanuel Hospital and had about four or five operations up there this morning?

A. That is right.

Q. For about how many years have you now limited your practice to bone work?

A. Since 1938.

Q. Are you acquainted with Mrs. Galina Smith?

A. Yes, I am.

Q. When did you first see her?

A. I first saw her in my office May 23, 1944, at which time she came to me for an examination.

Q. What examination did you make?

A. I examined her in reference to a chronic disability of her right knee. [67]

Q. Did you make X-rays?

A. Yes, I did.

Q. Do you have those plates with you?

A. Yes, I have the ones that I made in my office when I re-examined her yesterday, but I do not have the first ones.

Mr. Sims: I wonder if we might have the screen so that the doctor could use it, your Honor.

The Court: Yes.

Q. (By Mr. Sims): While they are having this set up, I wonder if you could explain to us the structure of the knee, what bones and ligaments or carti-

(Testimony of Dr. E. G. Chuinard.)

lages are included in the knee, what makes up the knee?

A. The knee joint is made up of the femur or thigh bone and the tibia, or shin bone, the bone below the knee, and the patella or knee-cap. Those are the three bones that enter into the knee joint. Then, inside the knee joint are two sets of cartilages, one known as the articular cartilage which covers the ends of the bone, that the bones articulate on. Then, there is another set of cartilages, two of them, called the semilunar cartilages, which are little semilunar-shaped pieces of cartilage around the edge of the joint and which are not weight-bearing in function.

Q. What effect would normally be had upon a knee joint of a lady that weighs 165 pounds, making repeated jumps to a solid floor 35 inches? [68]

Mr. Powers: We will object to the question, if your Honor please. It is not a proper question. The doctor has treated Mrs. Smith and he has the history given by Mrs. Smith as to what she claims, how she claims this accident occurred. I think their testimony should be confined to that, rather than to speculate.

The Court: It would be better to ask that question later.

Mr. Sims: All right. I will withdraw it.

The Court: All right.

Q. (By Mr. Sims): You have now in your hands a series of X-rays. Will you take them in

(Testimony of Dr. E. G. Chuinard.)

their chronological order and tell us what they show? If you wish to use the screen, you may do so. It would be helpful perhaps.

Exhibit No. 1 is the one I would like you to start with. A. This is an interior view.

Q. What do you mean by "anterior?"

A. This is an anterior view of a knee joint, which is an X-ray made looking straight at the knee, from front to back. It shows some roughening on the lateral, what we call the lateral condyle of the femur; a definite offset—no articular cartilage and bone at that point—

A Juror: I would like to ask a question. Is that permissible? [69]

The Court: Yes.

A Juror: Is it true that with anyone 165 pounds and about thirty-six years of age that it would have a roughening like that in a normal knee joint?

A. No, that is not the normal finding.

Q. (By Mr. Sims): Is there any other abnormality in the knee?

A. There is possibly a slight depression in the lateral tibial plateau, the tibia being this area in here (indicating). That is a little deeper than you usually see and there is a little roughening there.

This other X-ray I believe is No. 2 and is a lateral view of a knee joint, and it shows some roughening of the tibial plateau and a little opaque shadow—there is a definite roughening of the articular cartilage of the femur. These things I have described are not normal findings.

(Testimony of Dr. E. G. Chuinard.)

Q. Is there any, what we call, arthritic lipping?

A. No, not in any of these films.

Q. If you will take the next in order, Doctor——

A. This is Exhibit No. 3, which is a lateral view of a knee joint. It shows, in addition to the findings previously described, a definite opaque foreign body which I am pointing to with my thumb.

Q. Before you leave that definite opaque body you have [70] there under your thumb, will you tell us whether that is in such a position as would normally cause a locking of the knee?

A. Of course, there must be some clarification of the term "locking." Patients often describe that as any sort of catching sensation, without the knee being completely locked. I doubt if it would cause a complete locking in that position, but it would—you can see the articulation of the patella or knee-cap as it rotates on the lower end of the femur (indicating).

These bodies are often larger than we see in the X-rays. There is tissue with calcium in it. A true cartilage, without any bony or calcified substance in it, will not show in X-rays. That is why that space is shown. Actually, if the space does not exist (indicating) there is cartilage there.

Q. In other words, the top of this sleeve bone, this femur, is made solid with the tibia, and made so by intervening cartilage, is that right?

A. Yes.

Q. The X-ray, however, makes it appear that the bones just stick out in space.

(Testimony of Dr. E. G. Chuinard.)

A. This Exhibit No. 34 again demonstrates the roughening previously described. This is an anterior view of the knee joint. [71]

This Exhibit No. 35 is an anterior view of the knee joint and, again, shows roughening.

Exhibit No. 36 is another anterior—a lateral view of the knee joint, which shows the same findings previously described, including an opaque foreign body.

Q. Including an opaque foreign body in the same area as shown by the previous films?

A. Yes. I have the X-rays made in my office yesterday.

Mr. Sims: With your Honor's permission, we would like to have the doctor refer to those.

Mr. Powers: No objection.

Q. (By Mr. Sims): Go ahead, Doctor.

A. This is one film which shows the true position of the knee, anterior view. It still depicts the roughness in the lateral side of the knee joint and the foreign body in the same position demonstrated in the lateral view.

Q. Doctor, based upon a study of the X-rays which you have referred to—turn that light on, if you want to—and which we have introduced here and which we have agreed were made over a period of more than three years, would you say that this foreign body is moving about in this knee?

A. It has not moved in the X-rays, the X-ray demonstrations, at all.

(Testimony of Dr. E. G. Chuinard.)

Q. Have you made any examination of her recently? A. Yes. [72]

Q. You said you did yesterday? A. Yes.

Q. What, if anything, did you observe or discover yesterday, in your examination?

A. For the first time, on all the occasions that I examined Mrs. Smith, she was able to show me what she has always described, and that is that this foreign body is very superficially placed; at times she can feel it and push it around. That, I was able to see yesterday.

Q. In your opinion, is this object you felt moving around, is that the same thing as this foreign substance?

A. It could be the same thing. I believe it is.

Q. You feel that there is some semilunar cartilage in this knee that is moving about?

A. I think there seems to be some injury to that semilunar cartilage, on the lateral side of the knee joint. I do not believe these bones could come together with such an impact without doing some damage to the semilunar cartilage.

Q. When the semilunar cartilage is damaged, will that damage repair itself with the passage of time, like a kink in a muscle?

A. Neither the semilunar cartilage nor the articulating cartilages repair themselves. Scar tissue forms in between. They don't heal across, as skin does.

Q. Having in mind the history that this lady

(Testimony of Dr. E. G. Chuinard.)

gave you, [73] Doctor, what, in your opinion, is this foreign substance, foreign body?

A. I think it is a piece of the bone, plus cartilage, knocked loose from the end of the femur, or it may just be the result of a hematoma, which has become absorbed except for the fibrous element and then, as calcium is deposited in it, you get what you call a calcified hematoma. I do not believe it can be determined from the outside certainly as to whether or not that is a calcified hematoma, or a piece of bone or cartilage that has been knocked loose.

Q. How did that condition come about normally, what caused it?

A. Calcification is a part of the healing process. For instance, we take X-rays of the lungs to see whether or not a latent tuberculosis has healed. One of the definite indications of calcium is the deposit itself in that region. Many people come in with a calcareous condition in their tissues. It is an indication that there has been some tearing of a muscle or injury or some kind or a pool of blood, but it has healed by calcification. That is a common occurrence in various diseases of the body.

Q. Is this condition, then, one that is incident to accident or trauma? A. Yes.

Mr. Powers: That calls for entire speculation, without [74] the history.

Q. (By Mr. Sims): You have the history before you?

A. I have the history here, yes.

(Testimony of Dr. E. G. Chuinard.)

Q. Go ahead and give us the history.

A. She told me she injured her right knee on the 15th of May, 1943, when she jumped in the act of working; that she landed on her feet and at that time most of the weight seemed to be on her right leg, and she experienced sudden pain, severe pain in her right knee.

When I questioned her as to this, she said, as far as she could remember, there was no direct contact of the knee with the ground or the floor or any object, and that she does not remember a severe twisting or sprain of the knee.

Q. Based upon the history that she gave you, and your X-rays, your X-ray studies, and your physical examination of this knee, what, in your opinion, is the cause of that condition?

A. Relying upon the patient's statement that she has had no other injury or accident and on the history of continuous trouble since that time, and putting the physical findings and the history and X-ray findings all together, it seems apparent that the patient has had a chronic disability in this knee resulting from this injury which she mentions.

Q. Based upon your years of experience and the type of work that you are now limiting your practice to, is this normal and is it the type of thing that would come from such a [75] history as this?

A. Yes, we see this happen frequently.

Q. Can this knee be treated by heat and massage or physiotherapy, so it will get healed?

(Testimony of Dr. E. G. Chuinard.)

A. No, those things will not cure the knee. They may help make the knee feel better at times.

Q. What is indicated, then, Doctor?

A. She should have surgery done for the purpose of removing this foreign body. It is the same as a person getting a piece of sand or some other object in their eye. It is a constant irritant to the synovia, to the knee lining, and should be removed.

Q. Do you feel what you felt was a foreign body, or was it a part of this fractured cartilage?

A. I think it is most apt to be a foreign body, because of the way she can move it and get it completely out of the region of the semilunar cartilage.

Q. Regardless of what it is, would you say it would require surgery? A. Yes.

Q. After surgery, would you say the knee would be normal and as good as it ever was?

A. No, it will not be. I do not believe this knee will ever be as good as it was before it was injured. That statement is based upon the fact that the patient has a roughening [76] of the articular cartilage. A knee that looks like this in X-rays, when operated upon, usually shows a definite roughening or what we call osteochondritis of the cartilage. That is roughening and fraying off. Another term used is traumatic arthritis, on the basis of trauma or injury.

Q. There has been some statement by counsel that this was arthritic. Did you find any evidence of that?

A. Well, the term "arthritic" usually is meant

(Testimony of Dr. E. G. Chuinard.)

to cover people who have an infectious arthritis. That is a type of arthritis that is rather widespread. This patient has not that kind of arthritis, I feel certain. I feel certain she has arthritis localized in one joint, as a result of trauma.

Q. What is trauma, Doctor?

A. That is injury, any injury.

Q. What would be the reasonable value of the services of a specialist such as yourself in removing the foreign body and fragment of cartilage, or whatever it is you found in there, to repair the knee? What would be the reasonable value of the services of an expert such as yourself?

A. Oh, depending on how extensive the work might have to be. May I ask, do you mean just the surgery or do you mean the treatment afterward?

Q. No, I mean the whole job.

A. The hospital and everything? [77]

Q. That is right.

A. I think with such after treatment it will run from four hundred to five hundred dollars.

Q. How long, about, would she have to be in the hospital?

A. That would vary a little bit, depending upon the length of the incision in order to get this foreign body out. Sometimes, they are available, just put in your fingers, but sometimes they are not quite so easy; it is quite a search to get them out. I don't believe her hospitalization would run over a couple of weeks.

Q. Say two weeks or fourteen days?

A. Yes.

(Testimony of Dr. E. G. Chuinard.)

Q. I assume, of course, it would only require one operation to remove both the foreign body and the damaged cartilage?

A. Yes. The cartilage could be inspected at the time and, if it is injured, as I believe it undoubtedly is, it should be taken out, because it will probably cause future damage or future trouble, if it is not.

Q. With this knee in the present condition, and prior to any surgery, is that naturally and normally common in the function of the knee that it locks the knee and makes it immobile so that the patient is likely to fall?

A. Yes, if the foreign body or cartilage, if loose and intruding itself between the articulating surfaces, it might impede the motion of the knee joint.

Q. If the operation went along smoothly—by that, I mean no infection or delay—would you say then it would still be permanently impaired?

A. Yes, I believe there will be some permanent disability, no matter what is done.

Q. If infection should set up in that knee, an infection that did not clear up, what then?

Mr. Powers: That is going quite far afield, I think, your Honor. It is speculative.

The Court: He has not said anything about infection.

Q. (By Mr. Sims): Ordinarily, Doctor, does infection always follow?

A. No, it does not, under modern surgical con-

(Testimony of Dr. E. G. Chuinard.)

ditions. I think one could almost forget about that.

Q. Very rare? A. Yes.

Q. You think it is so unlikely you could just forget about it? A. Yes.

Mr. Sims: I think that is all.

Cross Examination

By Mr. Powers:

Q. Doctor, just a few questions. I think your first X-rays were taken in 1944, some time. You have the exact date there. [79]

A. My first X-rays were made May 23, 1944, and again on October 28, 1944, and then these that were made yesterday.

Q. Yes, the ones that you brought with you today were taken two years after your last ones in 1944? A. That is right.

Q. Well, now, what can you tell the jury as to whether there has been any development of this arthritis in that two-year period? Can you see more now than you could two years ago?

A. No, I don't think so. There has been no increased roughening that I can tell by the X-rays.

Q. Ordinarily, if you have a traumatic arthritis, it continues to develop, does it not?

A. Well, not always, in a young person; if it is fairly superficial, that is, the cartilage has not been completely broken off so that the bone is entirely uncovered, then you usually do not get a continual—

Q. Arthritis is shown by the roughening of the bones, is that what it is? A. That is right.

(Testimony of Dr. E. G. Chuinard.)

Q. You have examined the X-rays taken on June 7th, I think it is marked, within three weeks after the accident. Will you state to the jury that, in your opinion, that roughening came as a result of an accident that occurred only two or three weeks before? [80]

A. Yes, it could.

Q. In your opinion, Doctor, did that come as a result of anything that occurred just a short time, two or three weeks, before?

A. It could have, yes.

Q. And your opinion is that it did, from the history given to you by the plaintiff?

A. Yes, and ruling out any other cause of it. I mean, I have to rely on the previous history. It fits into the history she gave, yes.

Q. What history did she give you about jumping, Doctor? You said no twisting, no sprain, that she knew of; she did not strike her knee against anything. What history was it that would indicate traumatic arthritis to you?

A. The arthritis itself—I think I perhaps see what you are getting at. The arthritis itself is not something that happened immediately. Arthritis is a chronic roughening of the joints. It is something that remains after the whole thing is over. You see in the X-ray the smooth contour of the surface of the bone. That still remains. That is why I say now that the patient has chronic traumatic arthritis of her knee joint.

Q. Arthritis, as such, is not something that just happens today. In your opinion, isn't it a fact that

(Testimony of Dr. E. G. Chuinard.)

you feel that arthritis developing there, and it had developed for some [81] little time before this accident, May 15, 1943?

A. Before the accident?

Q. Yes.

A. Oh, I don't believe so. I think that is the result of injury. Now, may I say why?

Q. Yes.

A. Because it involves only one condyle, on one side of the knee joint. If it were a disease process there, it would involve the whole knee joint, and you would expect both condyles, both sides of the knee joint, to be involved. It is not so here. It is on the one side. If this injury had been of more severity, probably it would have caused a fracture of one condyle or even both of them, but only one condyle was affected. May I refer to the X-ray again to make my point clear?

Say that you have a fracture. Then, you have to open it up and put a pin or pins or screws to push that back. This did not go that far. Those are quite common things, where you see a fracture of the knee joint involving only one condyle.

Q. It is not an uncommon thing to have a hypertrophic arthritis there? That would also be consistent with the plaintiff's condition?

A. That is right except for two things. One is that hypertrophic arthritis is a term that applies to arthritis that [82] occurs in older people. It is a degenerative process that takes place as the years go on. It is a getting-old process.

(Testimony of Dr. E. G. Chuinard.)

Q. It also comes in young people, does it not?

A. I think the classification of arthritis, as we find it among those who essay to classify it it places hypertrophic arthritis, or degenerative arthritis, as referring only to the older folks. The other point is—the other point of difference is that hypertrophic arthritis would involve the whole knee joint, on both sides. It would be general, not just a part of the joint.

Q. Is it not a fact that these little bodies develop as a result of hypertrophic arthritis?

A. They may come from several things——

Q. I asked that particular question: Is it not a fact that they do come from hypertrophic arthritis?

A. You are speaking in general, not this one case?

Q. Is that not a symptom of hypertrophic arthritis, to have some foreign body, bony substance, in the knee at times?

A. Yes, it is often found.

Q. It is very frequently found, is it not? Osteochondritis, don't that start by an impairment to the blood supply in the knee? What is the fact about that?

A. I think you are bringing up a point that was spoken of, osteochondritis dissecans. Yes, such a condition can occur, due to poor blood supply in any joint. [83]

Q. That quite frequently occurs in young people, does it not?

(Testimony of Dr. E. G. Chuinard.)

A. Not as frequently as in older people. It is usually an involvement of the whole joint. Many times that involves numerous joints in the body, too.

Q. Did you take an X-ray of the other knee to see what condition was there? To see what the condition was in the plaintiff's other knee?

A. No, I did not at any time.

Q. That would throw light on it, if it were a disease, would it not?

A. I don't believe it would in this case.

Q. If you found the same condition in the other knee of arthritis——

A. Of course, when the plaintiff came to me, it was the thought of finding out what to do—I didn't think it was probable. I don't believe that it has any bearing upon this case, or I would have taken it.

Q. Yes. Well, I will ask you again——

A. Yes.

Q. That is one check, is it not, where there is this roughening? There is arthritis in the knee now, is that not a fact? A. Yes.

Q. And if you found arthritis in the other knee, that would [84] be a check on it as to whether she—as to whether it might be disease or injury, is that not a fact?

A. It would be interesting, yes.

Q. How much of a jump did the plaintiff tell you she had made?

A. Well, I cannot answer that question now. I don't remember that she—she described this thing

(Testimony of Dr. E. G. Chuinard.)

to me at the time but I can't tell you how many feet she jumped.

Q. In the absence of knowing how far she jumped, is it not difficult for you to tell the jury that she landed with sufficient force that she would drive one bone against the other and break off a piece of bone?

A. Well, I presume that I did know at the time, but if I were to say definitely just how far a person jumped now, I cannot say because——

Q. The fact of the matter is, is it not, that she could not possibly hit that upper bone unless she jumped stiff-legged and landed stiff-kneed, isn't that a fact, and you so testified in the last trial?

A. These bones are always in contact, of course, but that would be a way to produce this injury which she had.

Q. If she did not jump stiff-legged and if she did not give you a history of jumping stiff-legged, she could not have struck these two bones together?

A. She showed me how she jumped, if that is what you mean, [85] but the distance I cannot verify.

Q. Did she show you how she jumped stiff-legged or stiff-kneed?

A. She told me she jumped off some object and down onto the——

Q. ——floor? A. ——floor.

Q. She did not tell you she landed on her knee, did she?

(Testimony of Dr. E. G. Chuinard.)

A. She told me explicitly she did not land on her knee.

Q. What would conduct that force up to the upper bone? The only way—at least as I get it out of your testimony—would be if she landed stiff-legged. If she has the knee bent, is there any contact?

Mr. Sims: That is an argumentative question. It is not fair to the witness.

The Court: Proceed.

A. The only thing—counsel would seem to think you can't injure it unless you fall directly on the knee or stiff-legged. For instance, I have a flexed knee. You can still have a bending in contact. I do not mean you have to have a complete 180 degrees extension in order to do it. In fact, what I said here was to me important, the important thing at the time, and that is I was trying to figure out what this patient's trouble was, the possibility of a cartilage injury or a foreign body. As I said, in fact, until the patient [86] came back this time, I had never personally demonstrated the floating around of this foreign body. It is a question whether it was attached yet or not. You are more apt to get a cartilage injury if the knee is twisted or strained.

Mr. Powers: Q. She did not give you any history of twisting or spraining?

A. She said she could not remember. She said

(Testimony of Dr. E. G. Chuinard.)

the pain was severe but she did not believe the knee had direct contact with the floor.

Q. I would like to confine my inquiry to this theory of yours that when she came down one bone got up so hard against the other that she knocked off this foreign body that is now seen in her knee-cap. My question is whether, in a flexed condition, like you demonstrated, there is any blow or any force against this femur that could possibly break off this body?

A. Yes, there is. It is much more than the femur against the tibia in that position (illustrating). In this position (illustrating) my weight does not act to transmit it to the ground but it is there, just the same. That seems perfectly clear to me.

Q. I was going into your own statement to the jury that it could be one of two things. One thing was that, in jumping, it had come up and knocked a piece, a bony portion, off the femur. [87]

A. Yes.

Q. And, in that connection, my question was, whether or not in your opinion that knee—if the knee was flexed that could happen and, if so, how much of a jump you would have to make.

A. Maybe I have not made that clear. Ruling out any other injury, relying on the patient's history——

Q. No, on your theory here. You do not have much of a history of how far she jumped.

A. I don't think she jumped very far. These so-called baseball injuries—the cartilages——

(Testimony of Dr. E. G. Chuinard.)

Q. No, not the cartilage. I am talking about the bone here.

A. I beg your pardon. That is right, but I think we are both trying to get this thing clear.

Q. That is right.

A. I am trying to answer your question correctly.

Q. To break a piece of that femur—that is the sleeve bone in the upper part of your leg?

A. Yes.

Q. To break a piece of bone off the femur from jumping, wouldn't that take quite a jump?

A. It would take quite a little blow, too.

Q. If your knees were flexed?

A. Oh, yes, it can do that. [88]

Q. Is there any force against that femur that could possibly do that, in a flexed position?

A. Yes. That is done every time—every time you jump off something, you come down with a springing motion. Nobody ever jumps on their heels. All you have got to do is to do that just once. We don't all jump the way we expect to. People do get broken bones when they jump—hitting something that is not level, a twisting force, a direct force. If you come down in such a way so that you get the two condyles being driven against the impact, instead of getting a good even motion——

Q. Can these two condyles come together without twisting?

A. Yes. They do all the time.

Q. A cartilage separates them, doesn't it?

(Testimony of Dr. E. G. Chuinard.)

A. Well, the cartilage is in contact of course. The cartilage itself is not big, the cartilage that covers the bone.

Q. The semilunar cartilage in there?

A. Yes. These condyles are sort of rounded on the ends.

Q. Did you find the movement of the knee normal at this time, outside of this foreign body?

A. Now, you are referring to the first time?

Q. The first time you saw the plaintiff and the present time.

A. Yesterday, no restriction in range of motion; the knee joint was stable; no appreciable atrophy of the thigh, the [89] two thighs.

Q. Will you explain that a little bit to the jury? What significance does that have, that there was no atrophy in the thigh or the leg?

A. It means that she is using it; it means that she is depending upon that knee joint, using it to such a degree that the muscles are being used and are strong.

Q. In other words, she does not show that she has been sparing it?

A. It would not indicate it from an examination, no, sir.

Q. You mentioned that this foreign body was superficially in place. I take it that is not deeply imbedded?

A. That is right. There are areas there around the knee joint where there isn't much tissue between the bone and the skin and not covered by much

(Testimony of Dr. E. G. Chuinard.)

muscle, and you can easily feel it. In fact, I did yesterday.

Q. That being the case, would that not simplify the removal of this?

A. It would, but I think the proper thing in this case is to make an incision extensive enough—it would not have to be too much—to inspect the knee joint, and inspect this semilunar cartilage, to see whether other things should come out, other possibilities of causing future trouble.

Q. Assuming that this foreign body is all there is to it, you could take that out without much of an operation? [90]

A. Depending if you cut it superficially——

Q. That is what I mean. You can see it, I take it. It would not be hard to reach, then?

A. No, in such circumstances as that, that would be thoroughly easy.

Q. It has been in that relative position for a period of over two years, hasn't it?

A. No, that is the first time I ever felt it. As to whether or not she felt it, she could tell you better than I. From the X-rays, it has always been located in the same position. That is what has led me to believe before that it was attached rather than loose.

Q. Can you say now whether it is or is not attached?

A. I think it is loose. We felt it definitely about the lateral side of the knee joint.

Q. Probably imbedded in fatty tissue?

(Testimony of Dr. E. G. Chuinard.)

A. Not imbedded enough to make it too attached, anyhow. I can't say whether this foreign body is what makes her knee lock or whether it is the cartilage.

Q. When did you take this history you are referring now? Was that in 1944?

A. Yes. Then, I made another history yesterday.

Q. Does she still claim it locks?

A. Yes, catches at times.

Q. It is something different than locking, is it not? [91]

A. That is right.

Q. Did she give you a history of having worked fairly steadily for the last year and a half?

A. No, she has not worked steadily, but she has been working. She has been interested in working as a dishwasher. She has tried to get the work that she had done before, but it put too much of a strain on her knee.

Q. You have no way of knowing whether this foreign body is the one that has caused the plaintiff's knee to catch, is that right?

A. I can say for certain that it is, but there may be some damage to the cartilage that is doing that, the semilunar cartilage.

Q. You have no way of knowing whether the cartilage is damaged or not?

A. Except as I have already mentioned, by the X-ray findings. It is almost impossible that you could get a crushing of the femur and tibia and not get something that would show in the X-rays, with-

(Testimony of Dr. E. G. Chuinard.)

out any crushing of the intervening substance, being the semilunar cartilage.

Q. That, Doctor, assumes that it came from accident, doesn't it, from trauma, we will put it? Assuming that it came from disease, the part just sloughed off? These things are just sloughing off?

A. What do you mean by "sloughing off?" [92]

Q. In explaining what this dissecans was—is that not a sloughing off?

A. Did I bring up the term "osteochondritis dissecans" before?

Q. You were asked about it.

A. Yes, and didn't I say that in my opinion I did not favor using the term "osteochondritis dissecans," because the ending "itis," in the most acceptable terminology, refers to infection like appendicitis and so on. The ending "itis" is not a good term for this. It should be "osteochondrosis," which means full; in other words, full of little foreign bodies. I do not believe that this is a disease process. I think it is due to injury. Whether it is due entirely to that, I cannot testify to that. It may be.

Q. And it could be due to disease, could it not?

A. Well, I don't believe so. That localized region in the bone, in the knee bone, I don't believe is due to disease.

Q. Although you do find foreign bodies very frequently in the knee joint? They call them "joint mice?"

A. That is right.

(Testimony of Dr. E. G. Chuinard.)

Q. That is, without any accident at all?

A. That is right.

Q. Here, if it developed the plaintiff had had trouble with her knee prior to that time, that would be consistent with a diseased condition, would it not? [93]

A. I would say this: I would rather believe this patient had had a previous injury which caused this trouble than that she had had any diseased condition which caused it. I can't say that these findings in her X-rays or her symptoms are due to this accident that she is claiming. I have no way of saying that. However, everything is compatible with that, but the appearance of the X-rays indicates to me definitely that at some time she had a trauma which caused her trouble, rather than a diseased process.

Q. When you say that you probably hear about these things every day, according to the history she gave you, it is an unusual thing for you to find broken pieces of bone from the femur, is it not, from a trifling accident like that?

A. It is not as usual as some things, but it is not unusual altogether. Let me reiterate a point I made. I don't know that this came from the end of the femur. It might have been just a calcified hematoma.

Q. A calcified hematoma of that size would be a very rare thing, would it not? A. No.

Q. In a knee bone? A. No.

Q. Is that fibrin you talk about coagulin fibrin?

(Testimony of Dr. E. G. Chuinard.)

A. Fibrin. Fibrin, of course, is a part of the blood. You just take blood and put a stick into it and you get [94] fibrin on the end of it. As part of the blood absorbs in the knee joint or any other place, it leaves fibrin and that often forms a thick scar tissue, and calcium is deposited in it and then you get your so-called calcified hematomas.

Q. There is no calcified cartilage here. If there were, you would see that in the X-ray, the cartilage itself?

A. Sometimes we see calcification in the semilunar cartilage. That is not shown.

Q. That is not in evidence here?

A. That is right.

Q. Is it not a fact that the coagulation of this fibrin is mentioned as something like mellow seed or a rice body? You do not find these larger foreign bodies you are talking about as a result of any blood or fibrin coagulation?

A. This so-called joint-mouse don't necessarily have anything to do with the hematoma, calcified hematoma. The so-called rice bodies are usually a term that is applied to tuberculosis; when we have tuberculosis in a joint you will have little rice bodies, but those are somewhat different in appearance from the others.

Q. As I understand your testimony, you thought some of the fluid in the blood was absorbed and the rest of it developed into this fibrin? All I am asking is this: Outside of tuberculosis, regarding this coagulation of the fibrin, or whatever the term is,

(Testimony of Dr. E. G. Chuinard.)

medical authorities nearly [95] all recognize it is a small body, known as a melon seed or rice body, rather than one of these pieces of bone.

A. I don't follow that.

Q. Are you familiar with Dr. John Lewis, Professor Emeritus of Johns Hopkins Medical School?

A. Well, I knew who he was.

Q. In 1944, he published a work.

A. Did he write that himself?

Q. I think he did.

A. Or was it just a collection of things that he has gathered?

Q. You are familiar with his work?

A. Is he just an editor?

Q. This is his book. He is the editor of this.

A. Or did he get someone else to write a series of articles? He is not an orthopedist.

Q. Do you disagree with that?

A. No, I just don't see where it pertains to the knee at all. We could just spend a lot of time on irrelevant things that you can maybe think of.

Q. Aren't they formed as a result of a degenerative process, these little bodies?

A. Yes, they often are. In osteonecrosis, little pieces of bone break off in the knee joint or whatever joint is involved. [96]

Q. Then, the removal of such a body, because of the necrotic condition, is of secondary importance?

A. The removal of such bodies? That is of secondary importance?

Q. Yes.

(Testimony of Dr. E. G. Chuinard.)

A. No, that is not true. This is a pretty good-sized piece in there, and you can imagine it rolling around inside the knee joint. It is just comparable to having a piece of sand or a grain of wheat in your eye.

Q. You attended Oregon Medical School, I think you said? A. Yes.

Q. Dr. Charles McClure was one of your chief instructors? A. Yes.

Q. In orthopedic matters?

A. That is right.

Mr. Powers: That is all.

Redirect Examination

By Mr. Sims:

Q. You started to say something about baseball injuries and you were interrupted. I am interested in that. Baseball pitchers chip fragments of bone just by pitching the ball——

Mr. Powers: I think that is too remote in this case.

Mr. Sims: You asked about it in this case and I want to know about it.

The Court: Answer. [97]

A. They are not so apt to pull a piece of bone loose. A typical example of the point is an instance in which the ankle is bent inward or outward, one or the other, and the end of the bone is pulled off, and the ligaments pull it back. The bone gives rather than the ligaments.

The thing of interest about the knee is that I

(Testimony of Dr. E. G. Chuinard.)

wanted to know whether or not the patient had a sprain or strain in the knee, rather than some sort of a direct contact. This patient did not experience this strain or sprain. It was just that she jumped down on this knee and felt pain in her knee.

Q. (By Mr. Sims): Would jumping down from a level of 33 or 34 or 35 inches on the part of a lady thirty-eight years old, weighing 165 pounds, do the damage that you have described?

A. I believe it would.

Q. As to this arthritis, do you feel the X-rays, if this is a diseased condition, if there wasn't an accident, do you believe that X-rays of the other knee would show the same effect or condition?

A. I don't believe it would. Of course, this term "arthritis" is bandied about so much, and we have to know what we mean by it. We see people coming in, fifty or sixty years of age, that have been in an automobile accident, and you take X-rays for something else and you find their bones are [98] exceedingly rough. The X-rays locate the trouble. The arthritis is there, but it means nothing in the case.

I think such a disease as arthritis, as we think of infectious arthritis, is not a part of this picture in this case. I think it is traumatic arthritis, from some trauma of some kind.

Q. From the X-rays and from the case history, what do you feel the probabilities are as to when that occurred?

The Court: That is all covered.

Mr. Sims: It has been covered, yes.

(Testimony of Dr. E. G. Chuinard.)

Q. Are there any other ligaments in this knee that would be torn beyond repair?

A. No. Even when I examined her the first time, I made note that the ligaments inside the knee joint and outside were intact?

Q. So that the injury is limited to this foreign body and to such cartilage as might have been fractured at that time?

A. Yes, that is right.

Q. And the foreign body, as I understand, it is your best opinion it might be a small fragment from the femur or it would be such a calcified blood mass that would fall off or be pulled off?

A. That is right.

Q. There is evidence in this case that, following the accident on May 15th, the knee puffed up and was swollen. Does [99] that indicate blood on the knee?

A. Absolutely, that is what swelling of the knee is. We will have cases come to the hospital like that, with intense pain, where there is no fracture in the knee-cap. Any acute sudden swelling with pain is due to a collection of blood in the joint.

Q. We have the benefit of the testimony of Dr. Woerner, who examined the knee shortly after, a day or two I think after this happened, and he said that there was swelling. You may not have heard this before.

Having that in mind now, and that is the evidence in this case——

Mr. Powers: Moderate swelling.

(Testimony of Dr. E. G. Chuinard.)

Q. (By Mr. Sims): Moderate swelling in this knee. Having that in mind, as well as the other matters that you have referred to, would you say the probabilities are that there was a blood mass that became calcified?

A. I think it would be more likely to have been a calcified hematoma.

Q. Doctor, does this foreign body show more clearly and more distinctly in the later X-rays than in the films taken at Bend just a few weeks after the accident?

A. I think the bone calcification in it appears denser.

Q. Would that indicate that it was either a bloody mass or was a chip of bone? [100]

A. I don't think you can say.

Q. That would not matter?

A. I don't believe so.

Q. With the best possible result in surgery, would that be as good as——

Mr. Powers: We have been over that three times.

The Court: Sustained.

Mr. Sims: That is all.

Recross-Examination

By Mr. Powers:

Q. These hypothetical matters, where they pulled off a bone, would take some stretching of ligaments, would it not?

A. A ligament does not stretch. A ligament bends and it does give, but does not stretch.

(Testimony of Dr. E. G. Chuinard.)

Q. Are the ligaments intact? A. Yes.

Q. Nothing wrong with them? A. No.

Q. The whole range of motion on both sides of the knee?

A. The same results from that standpoint?

Mr. Powers: That is all.

Redirect Examination

By Mr. Sims:

Q. Then, as I understand it, if a piece of bone was pulled off, it would be because the ligament was giving and the bone—— [101]

A. Well, here, you see, instead of having a sort of evolution of the mechanism, pulling apart of something, you had a crushing against something, simply due to attrition.

Q. Is that a painful sort of experience?

A. Yes.

Mr. Powers: That is not the experience in this case.

Q. (By Mr. Sims): In this particular case, would she have pain immediately following this jump? A. Well, I should certainly think so.

Q. Referring to the matter of surgery, is that painful, too?

A. Of course, during the surgery she has an anesthetic for that, but afterwards they do have pain for two or three days, quite a bit, which, of course, would be controlled. That is all we can do.

Q. For how many days following such a surgery would she have extensive pain?

(Testimony of Dr. E. G. Chuinard.)

A. Well, she would not have extensive pain but a few weeks.

Q. It would diminish soon after the operation?

A. That is right.

Mr. Sims: I think that is all.

Recross-Examination

By Mr. Powers:

Q. Is it likely a person would have such a severe blow as [102] to break off a piece of bone and, after getting first aid, after an hour or two would go back and work the rest of the night, and keep on working the rest of the night?

A. Well, it depends somewhat on the person, of course. Yes, that is possible. We see people working, that keep working with fractures, and come along. If the weight-bearing part of the bone is such that the bone does not give way, then, it is possible. Football players finish the game.

Q. I am not talking about football players, but a woman who went to work and worked the rest of the night.

A. Somebody who had a great amount of determination would do it; depends on the amount of pain and such factors.

Mr. Powers: I guess that is all.

(Witness excused.)

The Court: We will adjourn until 10:00 o'clock tomorrow morning, Ladies and Gentlemen.

(Adjournment.) [103]

Court reconvened at 10:00 o'clock a.m., Wednesday, December 4, 1946.

BETH NORTON,

a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and was further examined and testified as follows:

Direct Examination

(Continued)

By Mr. Sims:

Q. Mrs. Norton, through the courtesy of the Court, you were withdrawn so that Dr. Chuinard could testify? A. Yes.

Q. We had not finished with your examination. I asked the Court Reporter the last question, and I think it was in reference to the condition of the mill now, the box factory part of the mill, as compared to the way it was when Galina Smith was hurt. You testified, I believe, that you could walk in on the same level. That was the last answer.

To go on from there, how is it that this material that goes to make up the boxes, in other words, the boards—before it was carried away on these rolls, which you say are taken away.

A. Carried away on a belt.

Q. Carried away on a belt? A. Yes.

Q. And the belt is where? [104]

A. Underneath the steel table.

Q. I am handing you, through the courtesy of the Bailiff, Plaintiff's Exhibit No. 27. I will ask

(Testimony of Beth Norton.)

you if you can indicate on that picture whereabouts that belt is.

Mr. Powers: There is no claim that there is anything wrong with it. I don't see the materiality of that.

Mr. Sims: It is material in this respect, your Honor, that they deny liability, they deny that that change could be made or was practicable. I think we are put on notice. We have to prove that they are carrying away the material just as fast and just as efficiently with the change made, and that it makes it possible now for punks to get in without jumping. That is the purpose of this examination.

Mr. Powers: What they claim is that we should have had some steps to get down into space and out. That is the only allegation of negligence that they have in there. There is nothing claimed about machinery at all, so we submit it is not material to the issues here.

Mr. Sims: We claim that it was practicable for them to make the change.

The Court: What change? He says you are only claiming about the steps.

Mr. Sims: I would have to have the pre-trial order before me.

The Court: Find out and know what you are talking [105] about.

Mr. Conway: Page 3, Paragraph V of the complaint, sub-paragraph 3, reads: "By designing mounting structure of the said high cutoff saw so that an entrance at pit floor level was provided for

(Testimony of Beth Norton.)

entering said pit, as was done for some of the other high cutoff saws."

The Court: What does that mean?

Mr. Conway: There are two other paragraphs, subparagraphs there and, as I say, No. 3 reads, "By designing mounting structure of the said high cutoff saw, so that an entrance at pit floor level was provided for entering said pit, as was done for some of the other high cutoff saws."

The Court: What does that No. 3 mean?

Mr. Conway: As I understand the situation, your Honor, it would include the situation that existed at the mill in connection with removing the rolls, which were along one side of the pit at the time Galina Smith was working there, and, after the rolls were removed, we have shown in the other trial, that they got the same amount of material through the saws, and so forth, and that the workers, the punks, could walk in on the floor level instead of jumping down. It was also referred to in the opinion of the Court.

The Court: What do you claim happened? What changes were made? Tell me what changes were made.

Mr. Sims: The rolls were actually removed and a belt [106] was installed under the table so the material is being hauled away just as efficiently by the use of the belt as it had been by the rolls.

The Court: How did they get in afterwards?

Mr. Sims: Walk right in on the floor level.

The Court: From where?

(Testimony of Beth Norton.)

Mr. Sims: From the street entrance, the rest rooms—the exhibits are in evidence, of course, the pictures.

The Court: I had not understood that.

Mr. Powers: There is no controversy about that, your Honor.

The Court: Walk straight in?

Mr. Powers: Walk straight in.

The Court: He says that was a part of the hazard as it existed, that she could not walk straight in there.

Mr. Powers: But he does not have it in his complaint, as such, your Honor.

The Court: That is his point No. 3.

Mr. Powers: What his point No. 3 actually has been, up to this time, is that these saws are up above and the material slides down and the working area for the worker there—the material comes down on a table like this (illustrating) and it is necessary for the worker to be up against the table. In other words, there is no way of having a stairway there.

The Court: You were not in the other trial?

Mr. Powers: This is from the record, your Honor.

The Court: Go ahead.

Q. (By Mr. Sims): Does that picture show the belt that you are talking about? I think I have already referred to the number on the bank. I want to identify it for the record. That is No. 27, is it not?

A. Yes, it is.

(Testimony of Beth Norton.)

Q. Can you point from where you are sitting and show us the belt?

A. Right along here (indicating) under that steel table.

Q. Does that conveyor belt show any of the material there?

A. Yes, here is one little bundle going down right here (indicating).

Q. Will you step down and indicate to the jury how that it?

A. (Indicating) Here is a bundle right here.

Q. By "bundle", what do you mean?

A. Well, you pile your lumber as it comes away from the cutoff saw, pick up a little at a time and put it on the belt.

Q. Have you actually observed this thing in operation? A. Yes.

Q. I suppose many times?

A. Many times.

Q. Does it take away the material as fast and as efficiently, [108] according to your observation, as the rolls?

A. Oh, yes. I don't see any difference.

Q. In other words, in your opinion, it is not slow and cumbersome? A. Oh, no.

Q. Moves along and takes the things away?

A. Yes.

Q. The same amount of material comes down from the saw? A. Yes.

Q. The same sawyers are working?

A. Yes.

(Testimony of Beth Norton.)

Q. So that now, as I understand it, you walk in to all of these pits just—well, to use a rather crude expression—just like stock coming in and out of a barn; it is just all level and there are stalls. It is the same situation? A. Yes.

Mr. Sims: So that the record will be entirely clear—I think perhaps there is a little confusion—we want all of the exhibits offered by the plaintiff.

The Court: You will have to wait until the Clerk gets back.

Mr. Powers: We will stipulate that the exhibits——

The Court: Wait until he gets here.

Mr. Sims: Your Honor, the stipulation Mr. Powers and I have made is that all of plaintiff's exhibits that were [109] offered at the other trial may be offered and introduced without objection and that, following your Honor's suggestion of yesterday, we will use the same identical numbers. That applies to the plaintiff's exhibits that were actually introduced in the former trial, unless counsel, of course, wants the pre-trial exhibits also. Is that correct?

Mr. Powers: That is correct.

Mr. Conway: These exhibits I have in my hand are the ones we went over this morning, Mr. Powers.

The Court: All right. Give them to the Clerk.

Mr. Sims: You may cross examine.

(Report of physical examination of Galina M. Smith dated 9/12/1942 and signed J. F.

(Testimony of Beth Norton.)

Hosch, an Examining Surgeon, thereupon received in evidence and marked Plaintiff's Exhibit No. 11.)

(Statement of Income Tax for Calendar Year 1943 paid to Galina M. Smith, Bend, Oregon, thereupon received in evidence and marked Plaintiff's Exhibit No. 12.)

("Shevlin-Hixon Company memo of final wage payment, period from 8-16 to 8-31", thereupon received in evidence and marked Plaintiff's Exhibit No. 14.)

(Three photographs thereupon received in evidence and marked Plaintiff's Exhibits No. 26, No. 27 and No. 28, respectively.)

(Statement of Galina Smith, October 26, 1942, to August 24, 1943, Record of time and earnings while employed, thereupon received in evidence and marked Plaintiff's Exhibit No. 30.)

Cross Examination

By Mr. Powers:

Q. I believe you worked in the daytime?

A. Yes.

Q. You were never there to work at nights while Mrs. Smith was working? A. No.

Q. What went on at night, you would not know anything about that, would you?

A. Would not be too different from the day.

Q. You just do not have any actual knowledge of what occurred at night? A. Oh, no.

(Testimony of Beth Norton.)

Q. I believe you stated you had occasion to crawl over the table here on numerous occasions, is that right? You came down the catwalk, walked down the steps, crawled over the table and then jumped in on the floor?

A. Walked from the table; don't have to get down on your [111] knees before coming to the edge of the table. You just jump over the bar over the saw and step on the table and jump from there to the floor.

Q. What kind of crawling did you have in mind when you testified?

A. Well, I perhaps should not have said that. I didn't mean it the way it sounds, I guess.

Q. You testified at the last trial you crawled, too, did you not?

A. Well, you crawl over the bar is probably what I was trying to say.

Q. I will ask you whether you did not testify at the last trial, reading from the transcript: "How would a punk get in and out of 4 and 5 in May of 1943?" Answer: "She would walk down the catwalk and crawl over the edge of the steel table and jump from there."

Mr. Conway: To the floor.

Mr. Powers: Jump from there to the floor.

Mr. Sims: That is what she is saying now, isn't it?

Mr. Powers: Just a moment, please.

Q. I think you said now you crawl over some bar, rather than the edge of the table?

(Testimony of Beth Norton.)

A. I don't know how to put it to make you understand what I mean. I don't know what to call the parts of the machinery. They are part of the whole thing, but we have to crawl over [112] this part to get your feet onto the steel table.

Q. The steel table is about what size?

A. Oh, I don't know. I don't hardly know how to say that, either.

Q. Is it a wooden table with an iron or steel top? A. Yes.

Q. Would you say it was something about three feet wide and a little longer?

A. Well, yes, the flat part is, but if you were giving the dimensions where your lumber slides, it has a kind of a sloped side to it and then there is this little square flat space where the lumber comes down.

Q. That is the part I am speaking of, the level space. Is that about three by four?

A. That is pretty close, yes.

Q. In that particular area there is no saw, is there, right on this table, where that steel top is?

A. Where the steel top slopes up?

Q. No, the flat part?

A. No. Your saw is above that.

Q. And that is about a three or four-foot area there? A. Yes.

Q. There is no saw on that; there is nothing on that, is there, on that flat area?

A. Nothing on the flat area, only just a place to kick [113] your scraps through.

(Testimony of Beth Norton.)

Q. When you say you crawl over the edge of the steel table and jump from there to the floor, will you explain to the jury just how that operation would be?

A. Well, from this flat place, your table, your steel table extends up at a slant, and that is what you crawl over to get on the flat place before you jump. I don't know just how to explain it other than that.

Q. You mean, you stand up on both feet on this table and jump off? A. Yes.

Q. Pardon? A. Yes.

Q. How do you get over the table while coming out again?

A. Your table is only three feet or such a matter. You crawl up onto the flat place and then crawl over the top of the table.

Q. The table actually is about the height of a stool at a fountain, isn't it; about the same height as a stool that everybody sits on at a fountain or at a counter? Isn't it about thirty-three inches?

A. No, I would say it was thirty-six.

Q. Pardon?

A. I would say it was thirty-six.

Q. In that area? [114] A. Yes.

Q. It would still be higher than the table in front of me, would it not?

A. I would say it was, yes. I can almost tell——

Q. Could you tell if you sat by the table?

A. Pretty close to where it strikes; you can almost tell.

(Testimony of Beth Norton.)

Q. Would you mind showing the jury from this table, if the Court does not mind, about where the table struck you, and we will see how much higher it is than this table.

Mr. Sims: You can measure it.

A. This table is lower than the steeltable.

Q. (By Mr. Powers): About where would it strike you?

A. About here (indicating).

Q. If you want to, hold your hand there and I can measure. Mr. Sims suggested that I can measure it and see.

Mr. Sims: The bottom of her hand is about six inches above the table top.

Q. (By Mr. Powers): It is six inches higher than the table. All right, take the stand, please.

Mr. Sims: Do you want that measurement?

Mr. Powers: We have the actual measurement, Mr. Sims.

Mr. Sims: Two feet seven inches to the top of this table, if you want it.

Q. (By Mr. Powers): Mr. Sims says the table measures thirty-one inches. Is that what you said?

Mr. Sims: Yes. I think that is accurate.

Mr. Powers: That is all right. I am not going to stop now. If that is the case, it is six inches or more. You would have it thirty-eight inches high.

Mr. Conway: Thirty-seven.

A. Right now, I am wearing high heels, two-

(Testimony of Beth Norton.)

inch heels, two and a quarter perhaps, and when I work I wear low flat heels. That would make a little difference.

Q. (By Mr. Powers): It would drop down two or three inches, then? A. Yes.

Q. It would not be far off from thirty-three, would you say?

A. I still say it is thirty-six.

Q. It would not be far off from thirty-six inches, then?

A. All right. It would not be.

Q. In getting out there, would you boost yourself up backwards, like some people might do (illustrating)? How would you get out of there?

A. As many times as I have got out of there, I still don't know. I imagine I would just crawl up.

Q. You stated yesterday you went in the way that just came naturally; I mean, the natural way to get in, did you not? A. Yes.

Q. Isn't it a fact that the natural way of going in was to [116] get on the edge of the table and slide in?

A. No. I never at any time ever entered that way.

Q. You never entered that way? A. No.

Q. Did you ever enter by supporting yourself on the table at all and going down?

A. I suppose I have at some time or another. You can always reach out and grab the steel bar that is there as you jump, but I don't know that I did that.

(Testimony of Beth Norton.)

Q. There is a steel bar you can take hold of?

A. There is one that runs up where they set the stops for the lengths of the lumber cutting. You could take hold of that.

Q. It is something that is not turning?

A. No, it is not stationary. It turns——

Q. Would you grab it when it was turning?

A. It is possible to grab it, but I wouldn't say that I did. I don't remember that.

Q. The saw itself, you could not reach from where you were working? A. No.

Q. That is all protected and covered is it not?

A. The saw is not covered when it comes out, I mean to cut the boards off, but it is back and forth.

Q. It is beyond the reach of anybody working there? [117] A. It is above the reach.

Q. Getting in the space, as comes naturally, did you ever use your hand on the table this way (illustrating) to help yourself down or anything? Or did you, as you told the jury, get up there and jump off?

A. I don't remember using my hands on the table, no.

Q. If you were going to do it, what way would come natural for you to do it?

A. I would just jump. That is all I can say, just jump off the table.

Q. Without using your hands or sliding yourself down?

A. I would not slide myself in, not for thirty-

(Testimony of Beth Norton.)

six inches. That is not too awfully far to jump.

Mr. Powers: I believe that is all.

Redirect Examination

By Mr. Sims:

Q. I know you haven't been well, but there is one other question I would like to ask. Mr. Powers has asked you if the saw is above the line of your hands as you work there. Suppose material is accumulated there, short lengths or perhaps pieces of boards, would those pieces of wood or refuse be within reach of your hands?

A. I don't understand what you mean.

Q. What I am getting at is whether—you can refer to those pictures if you want to to refresh your memory. [118] What I am getting at is whether, as the sawyer works, if some defective boards come out and there was a long sliver in a board, that hung out there, would that piece of board be within reach of your hands? Would it be there on this slanting steel table?

A. Well, if it would happen to catch in the saw and was long enough, you could reach up all right.

Q. About how far above your hand is that saw?

A. Oh, I would say possibly two feet.

Q. A couple of feet above your hand?

A. Yes.

Mr. Sims: Thank you. That is all.

Recross Examination

By Mr. Powers:

Q. When you go to a table to work, there hasn't

(Testimony of Beth Norton.)

been any sawing done up to that time, the time that you go in there, and the place is cleaned up when you go in there? I mean, the average person does not go in—I don't know about you as a relief worker, but at the start of the entire operation, when the crew goes in and works.

A. In her case at night, where they move like that, I think it would be.

Mr. Powers: That is all.

Redirect Examination

By Mr. Sims: [119]

Q. In other words, in the daytime operation, the daytime operation is different; in fact, there is more lumber being brought up to the sawyers, is that correct? A. That is right.

Q. While at night, the sawyer just works up the material that has been stacked there?

A. That is right.

Q. On the night shift, presumably, this table that she jumps from would be clean of shook, but during the daytime that would not be the case?

Mr. Powers: What happened in the daytime, your Honor, would not be material.

Mr. Sims: You went into it. I don't know why.

Mr. Powers: I asked her because you were bringing out something there about the place being so filled with debris.

Mr. Sims: That is all.

(Witness excused.) [120]

ANNA BELLE McGRADY WUTHRICH

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sims:

Q. Are you the one they call Belle McGrady?

A. Call what?

Q. Belle McGrady, Anna Belle McGrady?

A. I used to be Anna Belle McGrady.

Q. But you got married and your name now is Anna Belle Wuthrich?

A. Wuthrich.

Q. You live at Bend?

A. Yes, sir, I do.

Q. About how long have you lived at Bend?

A. Well, since July, 1936.

Q. Were you ever employed at the Shevlin-Hixon mill?

A. Yes, sir, I was.

Q. In what part of the operation?

A. Well, I was all over the place. I worked on all machinery.

Q. What machinery was there?

A. Well, there was ten high cutoff saws, probably nine at first. I think we had one cutoff saw that was a small one that set out by itself. We used it as a scrap saw. [121]

Q. By "scrap saw" you mean what? What would you cut with it?

A. Small things, you know, pieces that are not O.K. lumber, and we have to cut them into smaller things, and some of them had been ripped, and some of them had not; in other words, it was a scrap saw.

(Testimony of Anna Belle McGrady Wuthrich.)

Q. What other power-driven machinery was there?

A. Well, I guess all of it was power-driven. I don't know of anything else, only power-driven machinery.

Q. How about the rolls? Mr. Powers told the jury that the rolls were not power-driven.

A. The rolls were a combination of power and gravity. When I went to work there in 1942, the rolls came across in front of the cutoff. The high cutoffs were up here, in other words, and her working place was down here (illustrating), I would say five or five and a half feet from the floor to her sawyer, to her operator. He was up here (illustrating) and the rolls came across from each end and in the center here (indicating), or about the center, they were rounded out and they ran—like you bring them down into the middle of this court room. It didn't interfere in our working with them. But they were gravity after that in here, and came in a circle, and when they put the lumber on there—they were power-driven with an endless belt under them. Here (illustrating) they were slightly tilted, enough to give them a gravity force, and the lumber would be coming down—it would just shoot right down there.

Q. As these rolls came together and made this turn, were those rolls far enough apart that you could walk between the two?

A. No, they came together. These high cutoffs were already built here (indicating); the stands

(Testimony of Anna Belle McGrady Wuthrich.)

that held the rolls were built to the cutoff or to this place where the saws was installed, and when they came together, they came together around, well, I would say—well, we will say Number 4 and Number 5. Number 4, they could put their lumber on here and it went that way (illustrating); Number 5 would put their lumber on there and it would go that way (illustrating). I never seen any go down between those two places.

Q. Were those rolls behind the girl working in Number 4 or Number 5 power-driven?

A. Yes.

Q. Did you work in Number 4 and 5?

A. I worked in everyone of them.

Q. You worked in all of them? A. Yes.

Q. What do you call your job?

A. Well, we call it helping or punking, punking the cutoff.

Q. How did you get into this pit?

A. Well, we went up and walked on the catwalk, as we called [123] it, up a flight of stairs and walked out to whatever particular saw we was working on. Then, we went down, I believe, three steps, facing the pile of lumber that the sawyer was working on, then we stepped over this—well, I will call it a box here, under the saw—

Q. Yes.

A. —which was about five feet this way (illustrating). We stepped over that onto the working table, then we went down into the pit.

(Testimony of Anna Belle McGrady Wuthrich.)

Q. The Bailiff has handed you the pictures, No. 27, No. 28 and No. 29.

A. These are numbered on the back.

Q. Referring first to the one that shows the steps that come up from the ground floor to this extended catwalk, extended sidewalk or catwalk or whatever it is——

A. Yes.

Q. About how many steps?

A. Here is nine and then another step onto the catwalk would make ten.

Q. Then, when you went down the other side, on the sawyer's side, how many were there there?

A. Well, must have been four, but I didn't only use three because I didn't go clear down to the bottom. I would step over and get into my working place. I will say there was three to where you step over into the working place.

Q. What did you step over when you got onto this table? What would you step over?

A. From the step to the table?

Q. That is right.

A. Well, that was a partition built here (indicating) which goes clear out to the timbers, I believe, that hold the catwalk.

Q. Was there a bar that the sawyer used as he worked, so that, if he was going to cut twelve-inch, for instance, he could slide this bar up to the proper place to cut twelve-inch?

A. There was a bar on the sawyer's left.

Q. Yes.

A. It was here, running this way (illustrating),

(Testimony of Anna Belle McGrady Wuthrich.)

power-driven, and it was going round and round and revolving, also.

Q. It was going all the time? A. Yes.

Q. It was going all the time after he started it?

A. Until he would shut it off to do something.

Q. And would you step over this bar used to measure the length of the lumber?

A. That depends on which side I went into the saw on. There were steps on either side. We could go up either side. I have went over the bar, but it was a little difficult [125] to go over there.

Q. After you got down, then, on this table, how would you go on down into this pit or whatever you call it?

A. I would kind of sit down on my feet and jump down.

Q. Kind of frog-like, you mean? A. Yes.

Q. And then jump? A. Yes.

Q. How would you get out of this pit then?

A. Well, there is botches or places to stack lumber, your different cuts and different grades, and I put my foot in there, especially on the side where the bar was, the cutter's bar, and then I would hold onto this bar and pull myself out.

Q. You mean to tell us you climbed up over this bar and then—you go ahead with it.

A. Yes, and then I would get onto the steps and go up the steps and up the walk and down the steps.

Q. If you were going into another pit, you would reverse the process, and step over the table and then slide on down, is that right? A. Yes.

(Testimony of Anna Belle McGrady Wuthrich.)

Q. You are not working now?

A. No, I haven't worked since 1944.

Q. This pit is about what size? [126]

A. Well, I would say a girl's standing room, between her place, the shelves which they put their lumber on—above the table is a place to stack your different cuts and different grades. I would say that it was four and a half feet.

Q. The long way?

A. And about three feet the other way.

Q. How close were those rolls up to that table?

A. Well, about three feet. From the front of the table over to the rolls I would say was three feet. I am not sure.

Q. Let us say that here is your cutoff saw (illustrating) and here is this pit. Back here are the rolls.

A. Yes.

Q. How far from these rolls to where this girl is standing near the end of this table? You can refer to these pictures, if you want to refresh your recollection. I think the pictures show where the rolls were. Were the rolls tight up against the table?

A. I think they were.

Q. Were they so tight against this table that you could not walk between the rolls and the table?

A. No, you can't walk between the rolls. There was 1 and 2, Number 1 and 2, you could walk into.

Q. Why could you walk into those and not the others?

A. They were on the end, and there was room to walk in. [127] The rolls went up here (illustrat-

(Testimony of Anna Belle McGrady Wuthrich.)
ing) and came to an end, and you could walk in to Number 1 and 2, always from the time I started there. These pictures looks like the place after it was remodeled.

Q. What changes were made there?

A. Well, they took the rolls out from their present place and put them down on the end of the box factory, and then they put a belt, a powder-driven belt, under their work tables, and they took away the lumber, all that did not have to go to the resaw, and stacked it on trucks here, and this here, they did not have to bother with that, it went right to the resaw, and then the cull lumber and the scrap lumber, different grades, we just took them off and threw them under here on a belt and it carried them away.

Q. So, the operation was the same except that there were no rolls there. Now, right under this is this belt, is that correct? A. Yes.

Q. About how broad a belt is that, how wide?

A. I would say it is sixteen inches.

Q. About sixteen inches? A. Yes.

Q. Did you work there after these changes were made?

A. Well, they changed in the spring of 1944 and I worked until July. [128]

Q. Did you handle just as much lumber? Did the saws work just as fast?

A. Yes, the saws worked fast. There was a time before I left there that they took the night

(Testimony of Anna Belle McGrady Wuthrich.)
shift off, I guess, because there wasn't enough employees to keep the night shift going.

Q. They did work clear around the clock for a while, three shifts?

A. Yes, when I first went there they worked three shifts.

Q. Now, they are working how many?

A. I don't know what they are working now, but in 1944 they worked only one.

Q. They got down to one shift then?

A. Yes, they did, but whether they put them back or not, I don't know.

Q. Was just as much material handled?

Mr. Powers. We will admit there was as much and more. The change was made for efficiency purposes.

Mr. Sims: That is fine.

Q. About how long have you known Galina Smith?

A. Well, I met Galina in 1936. I worked with her.

Q. You worked with her for about how long?

A. I would say a couple of months, then.

Q. You saw her then every day, several times a day?

A. When I worked with her there, I saw her every day. [129] I worked right with her, yes.

Q. Did you work on the night shift at any time, in the box factory? A. No, I never.

Q. Did she work days when you were working with her?

(Testimony of Anna Belle McGrady Wuthrich.)

A. No, she worked nights. You asked me when I first knew her.

Q. Yes.

A. I worked with her in 1936, but not at the box factory. She worked nights at the box factory and I worked days. The fact is I was pretty proud to see her when I went down there because most of the girls were strangers to me and when she came in I felt that there was one girl there that I knew.

Q. You had a friend at least? A. Yes.

Q. One you had know a long time?

A. Yes.

Q. I suppose you left about 4:00 or 4:30?

A. No, I left at 5:00.

Q. She would be there for a few minutes before you left?

A. Ten to twelve minutes, usually.

Q. Of your own knowledge and from your own observation, did she have any difficulty with her knee, before she was hurt in May, when she went to the hospital? [130]

A. No, I never knew her being sick. Of course, I didn't see her every day, only when I worked with her, but I seen her working other places during this time, from the time I worked with her the first time until the last time.

Mr. Sims: You may cross-examine.

(Testimony of Anna Belle McGrady Wuthrich.)

Cross Examination

By Mr. Powers:

Q. Where had you worked with her, Mrs. Wuthrich? A. At the Pine Tavern in Bend.

Q. A restaurant over in Bend? A. Yes.

Q. What period of time was that, do you recall?

A. Well, it was in 1936. I went to work there when the Pine Tavern opened.

Q. You worked there together, about how long?

A. Well, I would say a couple of months.

Q. Am I correct in this, that the next time you saw her working was when she came down to Shevlin-Hixon?

A. Oh, no, I seen her working at an ice cream parlor in Bend.

Q. That is another restaurant?

A. Pardon?

Q. Is that a restaurant?

A. It is an ice cream parlor. I seen her going to the show, and I was always running out to her house and she [131] has been to my house a few times.

Q. You worked days at Shevlin-Hixon and she worked nights? A. Yes, sir, I did.

Q. So, you were not on the same shift with her?

A. No.

Q. Getting down to where you worked, you said you got down on your feet and then got down onto the floor?

A. I would get down and hold onto the table

(Testimony of Anna Belle McGrady Wuthrich.)

with my hand and jump down into my working place.

Q. In other words, you would have some support from your hands in getting down?

A. Well, if I didn't, I wouldn't have been able to work because I don't fall easy. I was very conscious of the fact, too.

Q. That was more or less a natural way for you to do it, to take hold of the table, when you got down, to kind of jump in that way?

A. Yes, that is right. I could climb out of there much better than I could get in to it because, down in the pit, you can see where you are and see where to put your feet to pull out and, in going down backwards like you would, you can't see those places, so you have to get on the table and then down into the pit.

Q. When you went down, you came down backwards like this (illustrating)? [132]

A. Not off the table, but to go over from the steps, over to the table, I naturally had to go backwards. If I had gone straight into my pit, I might have found a place to put my feet, but I can't go in that way, because I have to hold to something.

Q. You say that there are two ways in getting over to the table; one, you can step over the bar and, the other, there is no bar to step over, is that right?

A. That is right. On one side, the best I remember, there was a bar and the cutter stood facing the lumber coming this way (illustrating). That

(Testimony of Anna Belle McGrady Wuthrich.)

was on his left. It would be on my right. On this side, I don't think there was anything like that, because that is where we stacked most of our lumber. There were shelves or boxes or something to stack these different cuts in.

Q. You had the choice of going either of two ways. You preferred the one where there was no bar?

A. No, that was the hardest place to get over.

Q. So you took the other one?

A. Well, I took either one. I have been over them both.

Q. But you found the other one the harder. That is what I understood you to say?

A. If there wasn't a lot of lumber stacked in my way here, then, it was easier.

Mr. Powers: I believe that is all. [133]

Redirect Examination

By Mr. Sims:

Q. Would there be lumber stacked upon that table sometimes when going in there?

A. Well, we put our O.K. cuts—we would stack one here and one there. We would stack them that high (illustrating). We had marks on the back of the table for the different cuts and we would stack up to them. Sometimes, we would have two or three stacks on the table, because it is fast work, and it is easier to consolidate them and bring them up and throw them into the same place.

Q. You say it is fast work?

(Testimony of Anna Belle McGrady Wuthrich.)

Mr. Powers: There is no claim that there is any lumber there on this table at all. I think we are going quite far afield.

The Court: Go ahead.

Q. (By Mr. Sims): What do you mean by that?

A. The cutoffs are the fastest working I worked on in there because they are cutting like this (illustrating).

Q. Does the sawyer then wait for the punk to get into her working place?

A. In the morning, she gets in while he is—well, I will put it this way: We have a whistle that blows three minutes before the morning whistle. We are supposed to be in our working places when the whistle blows, and maybe the saw [134] was running when the relief girl would come down to take her place. When she comes down—when she starts to work, the other girl climbs out, and sometimes, when the girl comes back, the girl that works in that particular place, she gets down on the floor and then the relief girl leaves.

Q. Does the sawyer continue with his operation, or does he wait for the change of punks to be made and the material to be gathered up and the table cleared away?

A. Well, I imagine if there is any difficulty in her getting in, he would stop and, if not, he would keep operating.

Mr. Sims: I think that is all.

Mr. Powers: That is all.

(Witness excused.)

Mr. Powers: Dr. McClure is here. We have not reached our case but I wonder if we can put Dr. McClure on out of order?

Mr. Sims: That is agreeable. [135]

DR. CHARLES R. McCLURE

was thereupon produced as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Powers:

Q. Your name is Charles R. McClure?

A. Yes, sir.

Q. You are duly licensed to practice medicine and surgery in the State of Oregon, are you?

A. Yes, I am.

Q. Where do you have your office, Doctor?

A. I am in the Selling Building, Sixth and Alder Street.

Q. You have been located there for how long?

A. Since 1912; it is almost thirty-five years.

Q. Do you specialize in any particular branch of medicine or surgery? A. Yes.

Q. What is that? A. Orthopedic surgery.

Q. Orthopedic surgery? A. Yes.

Q. Are you connected with any hospitals in Portland?

A. Well, I have been connected with all of the hospitals. For a great many years I was orthopedic surgeon at the Multnomah County Hospital; Doernbecher Hospital for Children, [136] over ten

(Testimony of Dr. Charles R. McClure.)

years; associate surgeon, Shriners' Hospital for Crippled Children, and for twenty-five years professor of orthopedic surgery, University of Oregon Medical School.

Q. You have taught this orthopedic surgery at the Oregon Medical School here in Portland?

A. Yes.

Q. In teaching there, did you have a student by the name of E. G. Chuinard? A. Yes.

Mr. Sims: I don't think that is important.

A. I remember him very well.

Q. (By Mr. Powers): Are you connected in any way with the State Industrial Accident Commission?

A. Yes, I am their chief examiner for Portland on a part-time basis, have been for many years.

Q. In your work, do you have occasion to diagnose bone injuries and knee-joint involvements, and things of that sort?

A. Many times, every day.

Q. Dr. McClure, you examined Mrs. Galina Smith, the plaintiff in this case, for us?

A. I did.

Q. Will you state to the jury when that examination was made?

A. I examined Mrs. Smith on May 22, 1944.

Q. Did you take X-rays? A. Yes.

Q. Have you had an opportunity also to examine the other X-rays that have been made here by other doctors of Mrs. Smith. A. Yes.

Q. The two X-rays made in June, 1943, at Bend

(Testimony of Dr. Charles R. McClure.)

and the series of X-rays made here in Portland by Dr. Chuinard's office? A. Yes.

Q. In addition to that, in addition to those and your own X-rays, there was another X-ray that was introduced into evidence here yesterday, which I think was taken just a day or two ago. If we might see that X-ray so that the doctor may have it, please. I think it is Exhibit No. 37. You have examined all of them except this one? A. Yes.

Mr. Powers: Could we have the earlier X-rays, No. 35 and 36, handed to the doctor.

Q. I will ask you this: Did you find any arthritis in the plaintiff's knee?

A. I found none, no; that is, I saw nothing in the X-ray that I considered arthritis from an X-ray standpoint. That is what you mean?

Q. Yes. Take a look, Doctor, and compare those. I think [138] the box is right there.

A. I can see well enough, unless you want me to show them in front of the jury. I can see well enough. Do you want me to look at this again?

Q. I want you to say whether there has been any development of arthritis.

A. Since the first picture to this last picture?

Q. Yes, since the first picture. The first X-rays are marked 1 and 2.

A. I see no additional—I see no changes or additional development in the X-rays since the original ones and the ones you just handed me, as having been taken this week.

(Testimony of Dr. Charles R. McClure.)

Q. In the first X-rays, do you see any roughening of the bone, or whatever that is in the first ones taken? That will be in 1943.

A. I will have to find those.

Q. June, 1943.

A. You asked me if I saw any roughening in the first pictures.

Q. Do you see any roughening there?

A. Well, I see a suggestion, a suggestion of what you might call roughening or erosion or a little defect in the surface of the lower end of the thigh bone where it enters into the knee joint, call it. That is what we call a condyle. But the same thing is still shown in the last film. [139]

Q. Has there been any development, any increase in that which you see at all?

A. No, no increase at all that I can see.

Q. I will ask you, Doctor, to assume that the plaintiff jumped off a table and had a pain in her knee and moderate swelling in that knee, and went on working that night, and later she went to the hospital. You have already had this history. I will ask you if that erosion or roughness could have developed in a period of three weeks, in your opinion?

A. It could not.

Q. Is that a slow process, or what would you say, Doctor? Can you explain that to the jury, please?

A. Well, it is a slow process, I think, in view of the other findings in the picture, yes.

(Testimony of Dr. Charles R. McClure.)

Q. In your opinion, could that be the result of jumping off of a table at that time.

A. Two or three weeks previously?

Q. Yes. A. It could not.

Q. What history did the plaintiff give to you?

A. She told me that on May 15, 1943—that was a year before I saw her—while working in a box factory, on high cutoff, she jumped a distance of about three feet onto a pit floor; that when she landed she experienced a sharp pain in the knee and had to quit work. She said [140] considerable swelling developed, which persisted over a period of two weeks; she was taken to the hospital at Bend, Oregon, and there was seen by Dr. Paul Woerner; that she left the hospital but returned on May 25th and remained for a couple of weeks; she also said it was ten or twelve weeks before she did any work again at the factory; in fact, she was only able to carry on a short period, for a period of eight or ten days, and that she quit on account of her knee, and that since that time she has done nothing except her house or home work. That was the history she gave me.

Q. Did you examine her knee at that time?

A. I asked her concerning the knees. She insisted her complaints were confined only to her right knee. She reported a loose body within the knee that manifested itself intermittently on both sides of the joint, that it had always a feeling of hardness in it, and which she pushed back with her fingers, and, when reduced, she was able to walk

(Testimony of Dr. Charles R. McClure.)

again. Her report to me indicated that that lump or mass came out rather frequently. Those were her complaints.

Q. What did your examination disclose, roughly?

A. In examining her knee, her knee on that date had no swelling, and on that date I was unable to see or feel with my hands or demonstrate this body that she said came in and out intermittently. In other words, it did not show up on the date I saw her.

I tested the integrity of the supporting ligaments of the knee joint, both lateral ligaments, and the ligaments that cross the joint inside, called the crucial ligaments. These ligaments were all intact and in perfect condition. She had perfect motion in the knee. On motion, there was a little fine crackling or creaking in the joint, what we call crepitus. Those were the physical findings.

Q. Is that crepitation unusual?

A. Is that an unusual thing?

Q. Yes.

A. No, it is rather common. I have it in my knee right now. A lot of people have it that have never been hurt. It may affect a person who never had any injury. After that examination, I had X-rays taken.

Q. What do the X-rays show?

A. These X-rays showed what I started to say, a typical loose or foreign body within the joint. The X-rays also showed a defect of the joint sur-

(Testimony of Dr. Charles R. McClure.)

face of the femoral condyles. That is the lower end of the thigh bones that makes up the joint.

Q. Did you find any evidence of injury to a cartilage?

A. Well, now, you will have to make definite what you mean by "cartilage."

Q. Semilunar cartilage. [142]

A. No, I did not find any injury to a semilunar cartilage—did not find any semilunar cartilage injury at all.

Q. This foreign substance that you could see, is that an unusual thing to find? Do you find those in knees at times?

A. Well, it is not unusual to an orthopedic surgeon. I think to a great mass of people it may be fairly unusual but nothing unusual to me.

Q. What is the common reference to that type of foreign body? What is it called?

A. Well——

Q. A joint-mouse?

A. It has been called a joint-mouse.

Q. Does it move around some?

A. That is a characteristic. They tend to shift their position a lot or a great deal, depending on where they are located, and whether they have some little attachment to a piece of ligament or piece of tissue.

Q. You examined Exhibit No. 37. That was the one taken, I think, Monday of this week by Dr. Chuinard.

A. Yes.

(Testimony of Dr. Charles R. McClure.)

Q. You did see this joint-mouse or a foreign body in there? A. Yes, it is still there.

Q. Where is it located with respect to where it was when you saw it in your X-rays?

A. Well, it is almost in the same place. I will find my [143] films here. I don't seem to be able to locate mine for the present. Are mine here among these?

Q. Pardon me?

A. Are all of the films here?

Q. No, you probably do not have them all.

Mr. Sims: Here is an envelope here, Mr. Bailiff.

Mr. Powers: It should be 31 or 32.

Mr. Sims: No X-rays here.

Mr. Powers: No. 2 would be the one taken in 1943.

Mr. Conway: May I see those, please, all the X-rays?

Q. (By Mr. Powers): Here are two taken, I think, at Dr. Chuinard's office, about the same as yours in May, 1944. Could you examine those and—— A. Now, what is the question?

Q. Look at this series of X-rays and the two you took yourself. You have had an opportunity to examine them just a day or two ago.

Doctor, have you seen anything in the X-rays in evidence here to indicate that this foreign body came as a result of injury to the semilunar cartilage? A. I do not.

Q. Will you explain to the jury, first, as to whether a semilunar cartilage would show up in an X-ray?

(Testimony of Dr. Charles R. McClure.)

A. No, a semilunar cartilage is not discernible in an X-ray film. There are no calcareous or lime deposits in [144] cartilage. It does not show in an X-ray picture, so it is impossible from an X-ray picture to diagnose an injury to a semilunar cartilage.

Q. If this is what is called a calcified semilunar cartilage, could you tell that from the X-rays?

A. If you have a calcified semilunar cartilage, which is rare, very much of a rarity, you will see the outline of a cartilage and you will see a white mass and see that there are calcareous deposits within that. There is no suggestion of any such condition in any of these films.

Q. Can you state to the jury there is no calcified semilunar cartilage in this joint at all?

A. There is none.

Q. It has been suggested here that this foreign body that is shown in the X-ray—first, state to the jury where that foreign body, in your opinion, came from.

A. It came off the surface of the joint.

Q. What caused it to come off?

A. Well, now, in this particular instance, I will have to give the general nature of causes. I know from my teaching and experience and practice that those things drop or come off the surface of one of the bony joints or surfaces, due to some changes in the circulation that causes death, that is to say, necrosis of a part of the joint surface and, when that occurs, that portion of the joint surface that is [145] involved tends to gradually loosen and, in

(Testimony of Dr. Charles R. McClure.)

time, fall or drop off. It is due, as I say, to a change in the circulation that carries nourishment to the joint surface and, for some reason or other, the lumen, which is the inside of this small blood vessel that supplies that particular segment of the joint surface, becomes closed off or blocked, so that there is no blood supplying that joint surface. In time, it loosens like the bark of a tree, where pieces of bark loosen and fall away, where the sap has been cut off or dries up. It may drop off or it may fall off.

Q. That kind of process, does that have a name?

A. Yes, we call it osteochondritis dissecans.

Q. Osteochondritis dissecans. Would you explain that word? What is "osteo"?

A. "Osteo" means bone and "chon", that refers to cartilage, so it is an inflammation of the bone and cartilage. "Dissecans" has reference to the splitting up of pieces of cartilage.

Q. Is it in the nature of erosion?

A. Well, it is not an erosion until after it drops off. It leaves a little defect on the joint surface and that is where the erosion comes in. It is not an erosion until it drops off.

Q. Can you see that erosion in the films here?

A. I can see the place where it looks like it had been; [146] that is, the probable site.

Q. What does "itis" mean?

A. Altogether, "itis" means inflammation, so that "osteochondritis" means inflammation. Of course, I think the term is wrong in this particular

(Testimony of Dr. Charles R. McClure.)

instance because there is no inflammation about it.

Q. It has been suggested here that, because of the swelling, there was blood in the knee and that the residue of that fibrin, as Dr. Chuinard called it, would not be absorbed—most of it would be absorbed by the body but what was left would form a mass which would ossify or calcify. Would you state to the jury whether, in your opinion, that could occur or whether it does occur?

A. In all my experience over practically thirty-five years in this kind of work I have never contacted or seen a case where I had any reason to believe any such a thing ever happened.

Q. Assuming, Doctor, that the plaintiff now has full range of motion in her knee, as found by Dr. Chuinard on Monday, and that there is no atrophy or shrinking of the leg or thigh and the ligaments are in contact, and that she has a stable knee, will you state to the jury whether that situation would be consistent with any derangement of the semilunar cartilage, causing her trouble?

A. It is rather inconsistent, very inconsistent, if I may [147] make it that.

Q. What does that indicate to you, Doctor?

A. We see a great many cases where they have injuries to the semilunar cartilages, where there has been pressure or disability and where there have been repeated lockings of the joint, and with each locking of the joint the joint becomes irritated, you might say inflamed; the blood is segregated; and that causes repeated swellings and, due to the

(Testimony of Dr. Charles R. McClure.)

pain associated, and the necessary favoring of the knee on account of these lockings, they invariably develop varying degrees of waste or what we call atrophy in the muscles controlling the knee joint, particularly the lower part of the thigh. It would be my opinion that there is nothing within that knee joint causing such trouble, or she would have more symptoms or more findings than you describe.

Q. It has also developed this foreign body could be felt superficially by Dr. Chuinard a couple of days ago in the area or region where it is shown in the X-rays. Will you state to the jury—it having been in that location now for a period of two years or more—whether it would be a difficult matter to remove that?

A. Well, from a skilled surgeon's standpoint, it is a rather simple operation, a simple matter to remove it.

Q. Would you expect any operation and hospital bill would [148] cost from \$400 to \$750 to remove that?

A. I don't know, but roughly speaking, a charge of \$400 to \$700 to remove it——

Q. Four to seven hundred——

Mr. Sims: Counsel does not mean that.

Mr. Powers: I mean four hundred to seven hundred fifty.

Mr. Sims: The testimony of Dr. Chuinard was that the hospital and doctor bills would be between four and five hundred dollars. I am sure Mr. Powers inadvertently misquoted him.

(Testimony of Dr. Charles R. McClure.)

Mr. Powers: I took what Mr. Sims said in his opening statement. I don't know whether he had any testimony on that or not.

Mr. Sims: There was Dr. Chuinard's testimony.

A. Well, in general, that might be a very liberal bill, but I would not object to it if they could pay it. I think a doctor is entitled to anything he can get, like anybody else, but I think that would amply cover any expenses.

Q. (By Mr. Powers): What about the Accident Commission, what is allowed for that?

Mr. Sims: I do not think that is proper, your Honor.

The Court: Objection sustained.

Q. (By Mr. Powers): I will ask you whether a reasonable charge might be in the neighborhood of \$100 to \$150.

Mr. Sims: That is leading and suggestion. We object [149] to that. The doctor is competent to testify. Counsel has been leading him all the way through.

The Court: Reframe your question.

Q. (By Mr. Powers): State, if you can, what a reasonable charge would be for that?

A. Well, to begin with, the hospital bill would not be much, because it would not be necessary to stay in the hospital more than probably ten days at the most; anywhere from seven to fourteen days, so there would be the hospital bill plus the surgeon's bill. I think the surgeon's fee for that sort of operation should be anywhere from—I think a fair

(Testimony of Dr. Charles R. McClure.)

bill would be anywhere from \$150 to \$200, somewhere in that neighborhood.

Q. Would you see any reason for going into the joint, other than to just take that foreign body out?

A. It would make a bigger operation out of it, but I see no occasion for it.

Q. Doctor, in your opinion, a person jumping from a table somewhere between around 33 to 36 inches onto a wooden floor, without any trouble with the knee before, would she land with such force that she could actually break a part of the bone off that femur, if her joint was in good condition before?

A. I think it would be very unusual for it to happen. I have never seen it happen. I suppose in this world anything [150] can happen, but it would be most unusual. That is all I would say about it.

Mr. Powers: I believe that is all.

Cross Examination

By Mr. Sims:

Q. How much does it cost a day now for hospitalization?

A. Well, it varies on what type of room you have. The rates now run anywhere from ten to twelve dollars a day.

Q. Nurses are charging \$1 an hour, \$24.00 a day, aren't they?

A. Yes, if you need them, that is what they are charging.

(Testimony of Dr. Charles R. McClure.)

Q. What do they charge in a hospital for anesthesia?

A. Well, now, I won't say—I will say ten or fifteen.

Q. What do they charge for the use of the surgery?

A. That is about ten or fifteen dollars.

Q. Do they charge in addition to the expense for anesthetic?

A. Do they what?

Q. Do they make a charge in addition to the charge for anesthetic for the use of the surgery and room? They make another charge for bandages and medication?

A. Any necessary dressings or medicine are all extra.

Q. There is a little more to the history. Mr. Powers did not suggest this lady has lost thirty pounds in weight, she says, because of pain and suffering, and due to difficulty with this knee, and that for many years prior she had [151] had no difficulty or no trouble with the knee.

Having that further fact in mind, Doctor, and the fact that she experienced this pain and swelling in the knee the night of May 15, or the morning of the 16th, whatever it might be, having those things in mind, what would be your opinion as to the best practice in removing the foreign body? Would you go further and explore to see if, in addition, there was a fractured cartilage?

A. Based on the knowledge I have, I would not go further than just removing the foreign body.

(Testimony of Dr. Charles R. McClure.)

They are very simple things. They are right up near—I would get it out and quit.

Q. How do you account for the fact, if it is a very simple thing, that this foreign body always appeared in the same location?

A. Well, the interior of a knee joint is very extensive, ramified like. At the present time, the foreign body seems to be even above the bursae. In some cases there is a small opening between the bursae and the main part of the joint through which this goes. Sometimes, or quite often, within that bursae, and it don't seem to just make the proper maneuver but slips or slides back through it down into the knee joint, or else the bone becomes smaller, or sometimes a fragment becomes attached to some surface, some portion of the lining of the bursae, by a piece of tissue, something [152] like an adhesion, you might call it, and that might limit this excursion. But, at any rate, the last two of the films show this located up out of the knee joint proper.

Q. In an area where it would not cause locking of the knee?

A. It would be very unusual to cause locking, in that area.

Q. We have something more here than the foreign body, because there is a locking of the knee. Could there be a fractured cartilage in there that is causing the locking, in addition to the foreign body?

Mr. Powers: There is no evidence of any locking of the knee.

(Testimony of Dr. Charles R. McClure.)

Mr. Sims: I beg your pardon.

Mr. Powers: Dr. Chuinard said, as I understood, there was a catching in the knee, but no locking.

Mr. Sims: There will be evidence of that. There will be evidence that there is locking, even causing falling.

Q. You have my question in mind?

A. I think I understand it. In that connection, it is very possible that the fragment or, as we call it, the joint-mouse, may get between the bone and the quadriceps ligament, the ligament that connects this muscle with the knee-cap and shin bone, in such a way as to simulate locking, but as far as the so-called typical locking is concerned, that would not be expected there.

Another thing, if this amounted to a typical [153] locking, as you intimate you are going to bring out, to such an extent that she would fall occasionally, I think it would be a story—almost a story . for the storybooks that she did not have more findings than Dr. Chuinard found. We know we would expect to find a great deal of atrophy and we would expect to find swelling of the joint, a very irritable joint, expect to find some looseness of the joint, and evidently it is not present, so I would have to take that with a grain of salt myself, any such occurrence as you describe.

Q. In other words, you are saying you do not believe Dr. Chuinard when he said he felt something?

A. No.

Q. We have Dr. Hosch's testimony also.

(Testimony of Dr. Charles R. McClure.)

A. As far as I am concerned, if this lady tells me she frequently has felt something there and pushes it back in—I don't doubt they felt something there.

Q. In spite of this history that you have, you think \$150 is what you would charge?

A. I said to go in and remove that foreign body, I think \$150 would be a liberal fee, even in these "hifalutin" days we are having. If he was going to explore the whole joint, the whole knee joint, undoubtedly he would be entitled to \$250 or \$300, but I don't think that is necessary.

Q. Why do you think there is more probability of finding [154] calcium in cartilage than finding calcium in a fibrous mass or hematoma, or do you think that?

A. That would be easy to explain, if you were a doctor.

Q. I am not. That is the reason I am asking you.

A. This is the cartilage (illustrating); this is the tissue which covers the end of the bone (illustrating). When the circulation, or a portion of the surface, is stopped or cut off by some contraction or intrusion of the vessel, when this cartilage falls off there are a lot of tiny tissues that go with it. That is what shows in the X-ray picture. The cartilage does not show. Where you get the shadows are the bone cells in that piece of cartilage, though the typical cartilage itself has no bone cells in it, and it does not show. Any clot that is formed

(Testimony of Dr. Charles R. McClure.)

in the fluid that is in the knee joint, whether it is blood or just whatever fluid it is, in my experience has never been associated with any calcareous deposit, because there are no bone cells; there is nothing to form any bone.

Q. So you feel that if there is a floating mass there, it would come about because of a sloughing-off or jarring-off? A. Yes.

Q. That is what you had in mind?

A. Yes.

Q. Incidentally, Doctor, this long word, osteo—— [155]

A. ——chondritis dissecans?

Q. Yes. Dr. Chuinard further said that that is a misnomer and that the “itis” should be out of it.

A. I agree with him on that. Technically, there is no “itis” to it, but that term has been used for decades and it still is.

Q. You are rather proud of your job as an instructor, as far as Dr. Chuinard is concern?

A. I was. He was an attentive student, and was later house surgeon at Multnomah County Hospital. He did work at the Shrine Hospital while I was still there. Since that time, he has developed into one of the leading young surgeons of the city in that line of work, no question.

Q. He is doing work at the Shriners' Hospital for Crippled Children?

A. Yes. He is doing it, as far as I know. I am not going out there to check up or anything, but they would not keep him there if he was not

(Testimony of Dr. Charles R. McClure.)

good. The fact of the matter is, in my own observation, he is doing good work.

Q. Doing a good job? A. Yes.

Q. Does it take much jar to fracture either the internal or external semilunar cartilage?

A. In my experience, they are never fractured by a jar.

Q. What happens to a kid on a football field when he comes [156] in to you and says "They threw a block at me and it hurts like——"

A. Undoubtedly some jarring but there was a great deal more of twisting or tortion and strain.

Q. You are objecting to my use of the word "jar" and want to use the word "twisting", is that it? A. Yes.

Q. If I should get up on that table, jump off, and make a poor landing, it would not be unusual to fracture the internal semilunar cartilage?

A. I would say it would be very unusual.

Q. You often have fractured semilunar cartilages where people were sitting in automobiles colliding with another car, just on account of the traffic.

A. When the jar comes, it is not just a jar, but there is some kind of twisting or tortion or strain at the same time.

Q. It does not take very much of that sort of thing, then, to cause a fracture of the cartilage, is that right?

A. I think it is more of a strain than you intimate.

(Testimony of Dr. Charles R. McClure.)

Q. The cartilage, then, is pretty solid, next to the bone in rigidity? A. Yes.

Q. But, nevertheless, the muscles, ligaments and tendons around this joint could not make a solid joint where there is a turning pressure in there?

A. The cartilage lies inside the joint and attached to what we call a capsule. From this capsule run the ligaments, so if the torsion or strain is sufficient to twist that out, it may split the cartilage where it is attached.

Q. How many patients did you see the day you saw Mrs. Smith?

A. Oh, gosh, that has been over two years ago. Excuse me for saying "gosh."

Q. I said, how many a day?

A. Well, I have no idea whether I saw one or ten. I more likely saw a dozen. I don't know. It depends on what day of the week it was and how busy I was and whether I had to go in court like I have had today. The last few years, I have been cutting down on my work, so I may not have seen as many patients that day as ten years ago. I don't want to go into a lot of history here.

Q. No.

A. The last three or four years, I have been cutting down very rapidly. I have not been seeing as many.

Q. The probabilities are that you saw ten or fifteen patients that day?

(Testimony of Dr. Charles R. McClure.)

A. I would say yes. It is safe to say I saw at least ten. I don't know.

Q. You don't remember any of the other patients?

A. I have no means of knowing what day of the week it was or anything about it.

Q. You knew you were going to make an examination of her [158] for the defendant here?

A. Of course, I knew it because they sent her to me.

Q. You saw her only once. You did not see her this week? A. No.

Q. I believe you have already been asked, and that you have answered that the films don't show any hypertrophic arthritis?

A. They do not.

Q. What is hypertrophic arthritis?

A. Hypertrophic arthritis is that type of arthritis identified with irregularity or marked joint deformity. Nothing shown in this case at all like that.

Mr. Sims: That is all. [159]

CLARA LONG

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

(Testimony of Clara Long.)

Direct Examination

By Mr. Sims:

Q. Are you the lady they call Peggy?

A. Yes.

Q. You are Clara Long, that is your name?

A. Yes.

Q. You live over in Bend? A. Yes.

Q. How long have you lived over there?

A. About eight years.

Q. I told the jury the other day that there was a lady that had difficulty in getting in and out of the pit. Were you the lady?

A. No, I was not.

Q. Do you know who that was?

A. I can't remember right now who that was.

Q. Well, I was not sure whether it was you or not. Did you work at the Shevlin-Hixon mill?

A. The Shevlin-Hixon Box Factory.

Q. You worked in the box factory part of the mill? A. Yes.

Q. What did you do there? [161]

A. Well, I punked the cutoff.

Q. You punked the cutoff? A. Yes.

Q. What does that mean?

A. I grade lumber for the cutter as he cuts it.

Q. Were you working there in May, 1943?

A. Yes, sir.

Q. Were there rolls there at that time?

A. There was.

Q. Were they power-driven, or were they gravity?

(Testimony of Clara Long.)

A. They were power-driven rolls.

Q. You are sure of that? A. Yes.

Q. Was there a switch that turned the power on and off? A. Yes.

Q. I understand the rolls were used to take the material that you sorted and graded away from where you were working, is that right?

A. Yes.

Q. How were you girls dressed for that job?

A. We would have to wear slacks.

Q. You have to wear slacks? A. Yes.

Q. How did you get in and out of your working position?

A. Well, you walk up the stairs, up to the catwalk, down [162] to your cutoff you were going into——

Q. Let us take No. 4 to be specific. Galina says that is where she was hurt. How did you get into that one?

A. I would walk up the catwalk and walk down to 4, walk down the steps and step over this bar onto the steel table and jump off into the pit.

Q. Do you work at the mill now?

A. Yes, sir, I do.

Q. How do you get from the table down to the floor?

A. You just walk in there now, like you walk in up to your kitchen sink, or something.

Q. You say just like I would walk into your kitchen sink?

(Testimony of Clara Long.)

A. Up to the kitchen sink or up to the table at home or anything.

Q. How is the material taken now from that 4 position?

A. Oh, you pile it up so high on the table and whenever the cutter turns around to pick up another board, you grab a bundle of that and put it under the table onto the belt.

Q. Why is it you wait until the sawyer turns around? Is this stuff slid down at you?

A. Yes.

Mr. Powers: It is leading.

Mrs. Sims: Q. How does this saw work?

A. It is going back and forth all the time, and, when he turns around to pick up a board—— [163]

Mr. Powers: We will object to that, your Honor. There is no claim of injury due to any sawing work in any way. The claim of injury here is through not having a step to get down into the place and into the pit, and now they have made a claim that the rolls were changed and that they should have been changed before, so they could walk in. There is no issue as to this and there never has been as to the saw.

The Court: Go ahead.

Mr. Sims: Q. How far is that saw above your table that you jump down from?

A. I would say it is about two feet or two feet and a half. I don't know.

Q. Could you reach the saw from the floor?

A. No.

(Testimony of Clara Long.)

Q. How close to the saw were you?

A. Well, that table is about three and a half feet from the front of it to the back, and then that incline goes up about two feet.

Q. There is a sliding steel table?

A. A sliding steel table that the lumber slides upon and you are about three feet from that, where that lumber comes down that incline there onto this three-foot table.

Q. Is the top of the table covered with anything?

A. Yes, steel.

Q. It is steel? [164] A. Yes.

Q. That is all steel? A. Yes.

Q. Were you working the night shift in May?

A. No, I was not.

Q. You were working the day shift?

A. The day shift.

Q. In what particular, if any, is the job of punking different at night and at daytime?

A. They don't have as many cutters and punks on at night as they do the daytime. During the day, the cutoffs are all running. During the night, there was only two or three running.

Q. After the sawyer, at night, would use up the lumber that is stacked there at Number 3, say, then would he move to Number 4?

A. He would then move to Number 4 or whatever other cutoff he was supposed to move to.

Q. At the time the power-driven rolls were there, what did the punk have to do when the sawyer moved?

(Testimony of Clara Long.)

A. The punk would have to climb out of there and climb down into the next one.

Q. How would the punk then get into working position?— In the next pit, the one that she was in?

A. She would have to do the same thing as she did before. [165] She would have to go up those three steps from where she was, come out of this pit, have to go up three steps and down the catwalk to the next cutoff and then down the steps and over the bar and jump across.

Q. And then jump? A. Yes.

Q. How high is this table above Number 1?

A. I would say about 36 inches.

Q. Was there a difference in the height from the floor to the table in the different pits?

A. Yes.

Q. Why was that?

A. Well, some punks would measure—

Q. I do not mean punking. I mean the actual distance from the table to the floor. Was there a difference?

A. There was a platform put in there.

Q. I will ask the Bailiff to hand you Exhibits 27, 28 and 29. Can you show any platform in any of these exhibits? A. Which one?

Q. Well, you take any one and tell us the number on the back of the exhibit.

A. This is Number 27. This is the platform right in here (indicating).

(Testimony of Clara Long.)

Q. Would you step down so the jury can see, please? A. There is a table and platform.

Q. Would this platform vary in thickness, or were they decked with the same type of material?

A. They were decked with the same type of material.

Q. Some would be more worn than the others?

A. Yes.

Q. Take a look at Exhibit No. 28 and tell us if that shows anything different. I don't know whether the jurors in the middle can see these pictures or not. These two jurors did not get to see the platform you are talking about.

A. This is taken from where the sawyer stands.

Q. Yes. You can resume the witness stand. Before that decking was put in, as shown in Exhibit No. 27, how much further was the table to the floor? In other words, when this decking went in, how much did it build up the floor, if you know?

A. Well, I would say anywhere from an inch to an inch and a half.

Q. About how often would this material drop down from the saw as the sawyer stood there working?

Mr. Powers: That cannot possibly have any relation to the accident.

The Court: Go ahead.

A. Just as fast as the cutters wanted to cut. If they wanted to catch that saw each time it came over, the board came out there and they put it back.

(Testimony of Clara Long.)

They cut some boards [167] pretty fast, the cutters; some pretty fast cutters.

Q. Have you worked there since the power-driven rolls were taken out?

A. Yes, I have.

Q. You are still working there? A. Yes.

Q. Is there much material taken——

Mr. Powers: We will admit there is as much or more.

Mrs. Sims: That is all. Thank you.

Cross Examination

By Mr. Powers:

Q. There are two ways of getting down off the table. You could go over the bar if you wanted to, but if you went in from the other side there would be no bar there, is that right? You could go down the other steps and there would be no bar to go over, is that right? A. Yes.

Q. It was up to you to select which way you wanted to go, in that respect?

A. Yes, but generally whenever I went down in there there would be lumber piled up, because the noon whistle blows or something.

Q. You worked in the daytime? A. Yes.

Q. You did not work at night? [168]

A. No.

Q. You would not know whether there would be lumber piled up there at night or not?

A. No.

(Testimony of Clara Long.)

Q. Tell the jury how you got down from the table, down to the floor.

A. I generally jumped down.

Q. When you did not jump, how did you do it?

A. Well, I don't know as I ever got in there any other way.

Q. Would you stand up straight on the table and jump?

A. Never paid any attention to that; never grabbed hold of anything; I would step over this bar and go on down in there.

Q. Take hold of the bar and just go down in there?

A. No, I stepped over the bar onto the table and then jumped down in there.

Q. You would step one foot at a time?

A. No, it was——

Q. Could you slide off the table?

A. If you wanted the seat of your pants torn off from bolts or something.

Q. Were there bolts there?

A. Yes, that screwed this steel down to the table.

Q. These bolts stuck up? [169]

A. Well, they are not stuck up above the steel very much, but they have rough spots in them.

Q. You never sat down on the table or got down off the table, other than to just jump down?

A. I just jumped down.

Q. How did you get out of the pit?

A. I just climbed up on the table any way I

(Testimony of Clara Long.)

could get up there, see, and would go over this bar and up the three steps.

Q. In climbing up on the table, did you climb forward or turn around and go backwards?

A. I never go backwards, no; climb up where I could see.

Q. You are tall enough to almost sit there, if you want to. Did you ever sit on that table?

A. No, not on that steel. On one side, there is a place, there is no steel on it. On the left-hand side, there is no steel.

Q. That is the same height as the other, is it not?

A. Yes, it is the same height.

Q. If you wanted to sit, you would sit on the wood instead of the steel?

A. Well, that steel is cold.

Mr. Powers: That is all.

Redirect Examination

By Mr. Sims:

Q. Any steps or ladders that you could have used to ascend from or descend to the floor of this pit?

A. No, never had any since I have been there.

Mr. Sims: That is all.

Mr. Powers: That is all.

(Witness excused.)

The Court: How many more witnesses do you have?

Mr. Sims: I have just one more besides the plaintiff, the plaintiff and one other.

The Court: Put the other one on now. [171]

NORVAL C. HUFSTADER

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sims:

Q. You are Norval C. Hufstader?

A. Yes.

Q. Whereabouts do you live, Mr. Hufstader?

A. Bend, Oregon.

Q. You have lived there for quite a while?

A. About twenty-seven years.

Q. You are married and have a family?

A. Yes.

Q. Are you familiar with the Shevlin-Hixon Box Factory?

A. Yes, I worked there thirteen years, I think.

Q. About how many years?

A. I think thirteen.

Q. There is a photograph, if we may have it; just a small postcard picture of the mill.

A. That is it.

Q. What is the number on the back of that exhibit? A. 15.

(Testimony of Norval C. Hufstader.)

Q. Is that a picture of the mill and of the box factory?

A. Well, it is in there, yes.

Q. Do you know about how many people at the mill? [172]

A. In the mill?

Q. The whole operation there?

A. About 750 or 800, I imagine.

Q. I wonder if you would hand that picture to the jury? I believe the picture is in evidence. If you will hand it to the jury, they can have a bird's-eye view of the operation.

You say you have worked there about thirteen years?

A. Yes.

Q. Were you working there in May, 1943?

A. Yes.

Q. What was your job?

A. I was a cutoff operator, sawyer.

Q. What is a cutoff operator?

Mr. Powers: Everybody knows that, your Honor, I think. I think we are concerned with the accident.

Mr. Sims: It is proper, your Honor.

The Court: Go ahead.

A. I handle lumber and cut it for box stock. My job is to take boards, say, sixteen or twenty feet long, all sizes, sizes shorter than that. I have a saw running back and forth in front of me, and a control bar over here, with stops. I shove my board through the saw and have the stop set at 11½ or 16 or 20 inches long, and the saw cuts it [173] off.

(Testimony of Norval C. Hufstader.)

Then, the saw goes back, and I shove another cut through, 11½ or 12 or whatever it is.

Q. Is the saw moving back and forth automatically? A. Yes.

Q. Were you working at Number 4 or 5 on May 15th when this accident happened?

A. No, I was not.

Q. Was that Ed Leacock?

A. I believe so.

Q. Did you see Galina Smith that night?

A. Yes, sir, I did.

Q. You were working nights then?

A. I was working nights then.

Q. At that time you were working nights yourself? A. Yes.

Q. About how frequently had you been seeing Galina Smith there on the job, or did you notice her at all?

A. Well, I really never noticed her.

Q. On this particular evening, did you have occasion to notice her or see her? A. Oh, yes.

Q. What was that about, Mr. Hufstader?

A. Well, the foreman came to me along early that evening and wanted to know if I had my car and I told him yes, and he wanted to know if I would take a girl to the hospital [174] and I said, "Sure."

Q. Who was that?

A. That was Galina Smith.

Q. Who was the foreman? A. Guy Smith.

Q. They are not related in any way?

(Testimony of Norval C. Hufstader.)

A. Not that I know of.

Q. He just happened to be named Smith?

A. Yes.

Q. Did you observe Galina Smith? How did she look? Was she in pain?

A. Yes. She looked that way to me. I went out and up to my car and I noticed her coming through there. She was limping a little, and so I drove my car down close to the door so she could get in there instead of having to walk clear up on the hill.

Q. How many years had you known her before that?

A. Oh, a year and a half or two, about two years.

Q. To refresh your recollection, at the time this matter was tried before, you said it was about four years.

Mr. Powers: That is leading.

Mr. Sims. It is leading, but I am trying to refresh his recollection.

Mr. Powers: It is immaterial.

A. Four years? Might have been. [175]

Mr. Sims: Q. You think it was a good year and a half you had known her before that accident?

A. Yes.

Q. Had she had any trouble or difficulty with her knee? Was she limping before this accident?

A. I never noticed it.

Q. You saw her working around there. You go ahead and tell us what you did. You said you got your car and drove to the door of the box factory.

(Testimony of Norval C. Hufstader.)

Mr. Powers: That is all leading, your Honor. I object to it.

Mr. Sims: Q. You saw her in pain?

Mr. Powers: Object to that.

A. Yes.

Mr. Powers: He can state what he observed.

Mr. Sims: Q: What did you observe about it?

A. I noticed her limping and, so, I went up and got my car so she would not have to walk up the hill.

Q. What else did you observe about her?

A. On the way to the hospital? Well, every once in a while she would put her hand down here, like that (illustrating) and move it back and forth like that (illustrating).

Q. You took her to what hospital?

A. The Lumbermen's Hospital.

Q. What did you do then when you got there?

A. When we got there, she got out and walked up—stepped inside the hospital.

Q. How long did you stay at the hospital?

A. About a half hour I imagine.

Q. What happened, then? Did you take her back with you?

A. I took her back to work.

Q. Do you know what she did when she—do you know what she did after she got back to the box factory?

A. No, I never noticed.

Q. You don't know where she worked?

A. It is quite a while ago. I don't recollect.

(Testimony of Norval C. Hufstader.)

Q. Do you know whether there were live rolls, power-driven rolls in 3, 4 and 5 at that time?

A. At that time, I don't now remember.

Q. You do not remember? A. No.

Mr. Sims: I think that is all.

Cross Examination

By Mr. Powers:

Q. The fact of the matter is, Mr. Hufstader, that the change of rolls had been gradual?

A. Yes.

Q. Just when that occurred you would not undertake to say?

A. I would not undertake to say. [177]

Q. You say that Mrs. Smith was limping a little and, therefore, you went and got your car so she would not have to walk back?

A. Yes, I went up and brought my car down close to the door.

Q. Did you have to help her in the car or did she get in by herself?

A. She got in by herself.

Q. And to go to the hospital, to get in the hospital, she went in there by herself, did she?

A. Yes.

Q. She was in there about how long?

A. I would say about a half hour.

Q. And you waited for her, did you?

A. Yes, I did.

Q. Then, you brought her back to the mill?

(Testimony of Norval C. Hufstader.)

A. Then, I brought her back to the mill.

Q. Mr. Hufstader, how did the people get down from this table, down to the floor? Did you see them?

A. Yes. They climbed over my—stepped over my control bar, down onto the table and—I stepped into the pit myself; give one long step. They go in in all kinds of ways.

Q. Did you see them stand up and just jump in with both feet, or did you see them work themselves in?

A. Some of them jumped in with both feet. [178]

Q. They could sit down and slide in, could they not? A. They could.

Q. That was done quite frequently, wasn't it, by some of them? A. I don't remember.

Q. You don't know about that? A. No.

Q. About the saws you were operating, before, you said they were just clipping off boards like that (illustrating). Tell the jury about that, how those boards go.

A. They don't drop off that fast. The saw is high (illustrating) and runs back and forth about like that; about that fast (illustrating).

Q. Then, this steel plate on the table, tell us whether there are, in places, screws sticking up out of the plate.

A. There are screws that hold the plate onto the table. Some of the screws are sticking up once in a while.

(Testimony of Norval C. Hufstader.)

Q. But not over on the side where they work and where they slide in? A. Yes.

Q. The table next to it is the same height?

A. I believe they are all the same height.

Q. You could walk from one to the other?

A. No, they couldn't walk from one to the other, I don't think. You mean in the pit? [179]

Q. I mean, the table itself?— The surface of the table. There is one table here (illustrating) that has a steel top? A. Yes.

Q. And then the table next to it has a wooden top, isn't that right? A. Yes.

Q. They are on the same level there?

A. Yes.

Mr. Powers: I believe that is all.

Redirect Examination

By Mr. Sims:

Q. If the bottom of this pit, let us say Number 4, was worn and then later was redecked, how much difference would that make from the top of the table to the floor? In other words, how much build-up would that redecking do?

A. It would be either an inch or an inch and a half, if they put a four-quarter or a six-quarter board in.

Q. Any ladders or steps in there that you could step to? You said you took one long step. Was there a ladder?

A. Not that I know of.

(Testimony of Norval C. Hufstader.)

Q. Could there have been?

A. There wasn't.

Q. Could there have been?

A. I believe it would be in the way of the off-bearer, [180] having to step around her table inside there.

Q. Could there have been and removed by the off-bearer or the punk after she got in there?

A. It might be, yes.

Q. You could step on the ladder or step and then put it away after you got down there, and then reverse the process coming back.

Mr. Powers: He is leading the witness, quite a bit.

Mr. Sims: I think that is all.

Recross Examination

By Mr. Powers:

Q. They couldn't have a ladder attached right there because it would be right where they work and in the way. Isn't that a fact?

A. That would be my idea of it.

Mr. Powers: That is all.

(Witness excused.)

The Court: The jury may be excused until 2:00 o'clock.

(The jury was thereupon excused.)

Mr. Conway: I asked the Clerk as to these X-rays. I asked him as to what X-rays were put in evidence before. We find we have all the X-rays that were introduced before, at the other trial, ex-

cept No. 37. No. 37 was the one that was taken on Monday, I guess, of this week. So, that makes [181] seven X-rays, including everything introduced at the last trial.

I believe there were two other X-rays of the defendant at the other trial, taken by Dr. McClure, and, as I recollect the circumstance here the other day, Mr. Powers and I got all of the X-rays, eight in number, from the Clerk's office before this trial started, and we each signed for them. Then, Mr. Powers took all the X-rays with him. I didn't count our X-rays until they were delivered here to this courtroom at the beginning of this trial yesterday, and the X-rays that I got were only the plaintiff's X-rays which were introduced. I am just explaining to the Court how this circumstance developed, so I cannot account to you for your X-rays, X-rays that belonged to the defendant.

Mr. Powers: Here is what happened. The X-rays were made available to me after the other trial. I think Mr. George came up and got them so Dr. Chuinard would have them. I think we ought to be able to locate them this noon, the other two. But you got the X-rays, or someone from your office got them, to take them to Dr. Chuinard. Mr. George took them down.

Mr. George: I got some.

Mr. Powers: They were all there. I turned over all of them. That is what I undertook to do, so we will have [182] to check up this noon.

Mr. Conway: I imagine we can locate them

somewhere, because I think the Court should have the benefit of all of the X-rays.

Now, I would like to ask permission to amend our allegation in regard to general damages to the extent of \$5,000 more, and then increase the prayer accordingly, if we may be permitted.

Mr. Powers: I object to that at this time. It has been more than three and a half years now since the accident occurred. There would be no basis for an increase at this time.

Mr. Conway: The only answer to that, your Honor, is, if I may suggest, is that there has been a considerable lapse of time since the injury and since the complaint was filed this particular injury has developed into a more extensive injury than was contemplated in the first instance. The history of the case, and the doctor's testimony, shows that situation, and then there is also this other circumstance, your Honor: The dollar is only worth about fifty cents today in comparison to what it was at the time this complaint was filed. I think this matter should be considered in the light of that, should be considered in that connection, and that is the reason I am asking this out of the presence of the jury, your Honor. [183]

Mr. Powers: Dr. Chuinard found exactly the same condition before. His testimony was the same. They have known this all the time. We submit it comes too late at this time that they be allowed to increase the amount of their damages.

Mr. Conway: I don't know what else we could do, as long as we have this situation on our hands.

The Court: What about the point that the medical testimony is identical?

Mr. Conway: What is that?

The Court: What about the statement that your medical testimony is the same as it was before?

Mr. Conway: Dr. Chuinard, as I recall the record, testified to the effect that he felt the movement of this cartilage or some foreign body when he examined the plaintiff on Monday of this week and that he had not noticed before.

The Court: That simplifies it rather than complicates it.

Mr. Conway: In addition to that circumstance, I think he also went into the matter of this exploratory operation, in regard to her knee joint, because of the length of time that this condition has persisted since he saw her before, and he testified a different method of treatment would be required.

Mr. Powers: He said the X-rays showed exactly the same condition, that there had been no increase in roughening, [184] from the way the pictures——

Mr. Conway: We cannot——

The Court: One at a time. We were talking about the medical testimony. Let us settle the medical question, first.

Mr. Conway: I am sorry, your Honor.

The Court: Is his testimony different or is it not different?

Mr. Conway: I tried to explain wherein I

thought it was different. Maybe I am wrong, but that is what I thought it was.

The Court: Is Mr. Powers' statement correct that the X-rays were the same as before?

Mr. Sims: Maybe I could be helpful, since I took the depositions and was in the other trial. Dr. Chuinard's testimony is the same, as far as that is concerned, except that he now feels this foreign body, whatever it is, and feels it is now due to this semilunar cartilage in addition to the foreign body, and that when the operation does occur it should be extensive and an exploratory operation, and Dr. McClure himself testified, of course, the expense of a surgeon and the expense in connection with the hospital at that time would be greater for that type of thing.

The Court: Didn't Dr. Chuinard give the same testimony before? [185]

Mr. Sims: No, your Honor, I don't think so.

The Court: You had better read the testimony, instead of making me read it. You had better make certain of it. I am going to pass on this later.

(Thereupon a recess was taken until 2:00 o'clock p. m.)

(Court reconvened at 2:00 o'clock p. m., pursuant to recess. The following proceedings occurred in the presence of the jury:)

Mr. Conway: Mr. Powers found these X-rays we were talking about.

Mr. Powers: They were here in the papers, among the papers.

Mr. Conway: He has given them to the Clerk. I suppose the Clerk will do whatever is necessary with them. In regard to that other matter we were discussing when we recessed, we withdraw that motion.

The Court: Very well. Let us hurry along now.

Mr. Sims: We will call the plaintiff, your Honor. [186]

GALINA M. SMITH,

the plaintiff herein, was thereupon produced as a witness in her own behalf, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sims:

Q. You are the plaintiff, aren't you?

A. I am.

Q. Whereabouts do you live now?

A. Phoenix, Arizona.

Q. You live at Phoenix, you say, now?

A. Yes, I do.

Q. You are about how old? A. Forty.

Q. Are you married? A. Yes, I am.

Q. What does your family consist of?

A. My husband and my boy.

Q. Your home is where?

A. Phoenix, Arizona.

Q. Are you and your husband working in Phoenix? A. No, my husband is an invalid.

Q. Are you working?

A. Yes, I am working.

(Testimony of Galina M. Smith.)

Q. Getting into the issue here, where were you employed in [187] May, 1943, just prior to May, 1943?

A. I was in Bend, Oregon, at the Shevlin-Hixon Box Factory.

Q. How long did you work there before you got hurt?

A. Around ten months. I am not sure, but I think it was ten months.

Q. Had you been having trouble with your knee before the month of May, 1943? A. No.

Q. What occurred during the month of May? Did your job change in the box factory? Did you get a different job, a different type of work?

A. Yes, sir, I did.

Q. What was it?

A. Well, I went on the high cutoff, the new job I was on.

Q. How was that different than the other work you had been doing for the previous eight or ten months?

A. It was a lot different because it was a different position you had to work in; that is, you had to get into the place in a different manner than the one I had been working in.

Q. In what way was it different?

A. Well, you had to climb stairs and kind of swing over a railing or something of that order—I guess it is called a railing—and jump into the pit.

Q. Was there a pit in the other place you worked in? [188]

(Testimony of Galina M. Smith.)

A. No, there was no pit. It was floor level. You can walk into it.

Q. Who assigned you to that work?

A. The foreman.

Q. The foreman?

A. The foreman, Guy Smith.

Q. Is he related to you? A. No.

Q. Did he direct you in that new job? Did he tell you where to work? A. Yes, he did.

Mr. Powers: It is leading.

Mr. Sims: What is it?

Mr. Powers: It is leading. I would suggest that you let the witness testify.

Q. (By Mr. Sims): What was Mr. Guy Smith's connection with the mill, if you know, the box factory? A. He was the foreman in the mill.

Q. The foreman in charge of what operation?

A. The box factory.

Q. Was he your immediate foreman?

A. Yes.

Q. Who told you where to work and how to get in and out? A. Guy Smith did.

Q. What, if anything, did he say about it? [189]

A. Well, when I went to work there, he showed me how to go about it, and before I got into the place, I asked him how I should get in there and he said, "Yump," so I continued to "Yump."

Q. Did you later, and prior to the 15th of May, discuss with him any difficulties that you felt you were having because of this jumping?

A. I sure did.

(Testimony of Galina M. Smith.)

Q. What did you say and what did he say to you?

A. I felt a drawing or gnawing sensation in my leg.

Q. Which one, or both?

A. The right one, as I climbed in and out of that place; that is, after I jumped in and then after I climbed out again, I could feel that drawing, so I spoke to the foreman about it, and asked him if he couldn't put me on a different job, or he could fix some means by which I could get in there and out of there easier, and he just laughed at me and said, "Oh, that is just old age creeping up on you."

Q. At that time, how old were you? You were three years younger than you now are, is that right?

A. Yes, that is right.

Q. You are forty now?

A. I am forty now.

Q. Was there a step, any step that you might take between the 36-inch level down to the floor? Any stairs in there? [190]

A. There was no stairs in there.

Q. Was there a ladder? A. No ladder.

Q. Would it have been practicable to have had a step or a ladder in there to get in and out?

A. Well, I doubt if you would have had time to have used it before the cutter started to work there.

Q. We have been told about a belt that is in there now that was used to carry away the shook. I am wondering if you could have put a step in there.

(Testimony of Galina M. Smith.)

The Court: That is leading. Don't ask questions that way.

Mr. Sims: Was there a place where you could have put a step to have gotten in and out of the pit?

A. I believe there was, if it could have been pushed back under; that is, if I had the time to push it back out of the way after I got in there before my cutter started to work there.

Q. What do you mean by that?

A. Well, so often, if the cutter was in a hurry to cut that particular amount of work at night, he would have that saw going by the time I would hit the ground or the floor and turn around ready to grab a piece, or to grab boards that would already be coming down. I had to work fast to do that, very fast. [191]

Q. How did that saw move? We have had Mr. Hufstader on the stand. How did it move?

A. It would work back and forth just about like that (illustrating), and each time it went it would cut a slab of wood.

Q. If the sawyer had a board in there——

A. However, I believe they could adjust that, and then they could work faster or slower, as they pleased. I know the cutter I was working with was very fast.

Q. What was the name of the sawyer you were working with? A. Ed Leacock.

Q. Ed Leacock? A. Yes.

Q. Was there lumber brought up to the sawyer,

(Testimony of Galina M. Smith.)

or did he simply work up the lumber that was there, already stacked?

A. I believe he worked up the lumber that was already there and then moved on to the next one.

Q. Where did you start in working that night after you got there, in what pit?

A. Number 3 pit and we moved over to Number 4.

Q. Were you hurt in Number 3?

A. No, Number 4.

Q. What did you do after you completed your work in Number 3?

A. Well, I made the change into Number 4.

Q. How did you get in there?

A. Climbed out of Number 3 pit, walked up the little steps onto the catwalk, down the other three steps, over the railing and, I don't know—kind of a swinging motion to get in there with the railing, I remember that, and then I jumped from that platform on down to the floor.

Q. About how heavy were you at that time? What did you weigh? A. 165.

Q. What do you weigh now?

A. About 130.

Q. What happened, if you know, when you made your last jump down to the floor?

A. Well, I know I had an awful lot of pain when I hit the floor. I didn't know just what had happened.

Q. Where did you have pain?

A. In my right knee.

Q. What did you do then?

(Testimony of Galina M. Smith.)

A. I stood there and cried; it hurt so bad I couldn't do much else.

Q. What did you do? Did you tell anybody?

A. Yes, I called my cutter, the man that I worked with. I called him because he was already cutting there, those pieces of board were coming down, and I couldn't go on working, so I called him and told him I couldn't. [193]

Q. What happened then?

A. He called the foreman.

Q. What foreman? A. Guy Smith.

Q. What did he do?

A. He came and asked me what was wrong and I told him I didn't know, but I had hurt myself, so, then, he turned around and just left me standing there and went over to find somebody to take my place.

Q. He got somebody to take your place before anything was done about you, is that right?

A. Yes, that is right.

Q. What was done to you, if anything?

A. They didn't pay much attention to me right then.

Q. After he got somebody to take your place, what happened?

A. I got out of there as best I could; that is, I held to something. I remember reaching up and getting hold of something and pulling myself out of there as best I could, over the rolls.

Q. Were those rolls power-driven?

(Testimony of Galina M. Smith.)

A. They were power-driven, but at the time they were stopped.

Q. You say they were stopped when you got out?

A. Yes.

Q. What next was done? You say Guy Smith got somebody to take your place? What next happened? [194]

A. Well, I went up to the front of the building maybe—I don't know whether it is called the front or back. Anyway, I went to the nearest point I could go to and waited for him to come. I called him again and told him that it was paining me a lot and asked if he could do something for it and he suggested that Mr. Hufstader take me to the hospital.

Q. Was that done?

A. Yes, it was.

Q. Where did you go?

A. Lumbermen's Hospital.

Q. That is over in Bend, of course?

A. Yes.

Q. Do you know at what time the accident happened?

A. I believe it happened around 7:00 o'clock.

Q. What did you do when you got to the hospital?

A. There was only one nurse on duty. There was no doctor there at the time, and this one nurse took me in and put a lamp over it, you know, for heat.

Q. How long did you stay in the hospital?

A. I don't know the exact time.

(Testimony of Galina M. Smith.)

Q. Your best recollection?

A. I think it was a half hour, but I am not sure.

Q. What did you do after you left?

A. I went back to work at the mill and finished that shift. [195]

Q. Did you go back to Number 4, punking in Number 4?

A. No, I couldn't go back. I couldn't go back—in fact, I couldn't get in there, then, so they put me on the rip saw, in the place I had worked to start with.

Q. Did you get along all right, without any pain or trouble?

A. Oh, no. It pained awfully; in fact, that evening it was very difficult for me to get around and finish.

Q. Did you do your full duty, your full work?

A. No, I had to have help. As a rule, I would help others if they were loaded with shook, and that night I couldn't do that. I had to have someone to help me, because when I would go to push this it would make a strain on that knee and I couldn't do my work, really.

Q. Will you describe how your knee looked?

A. How the knee looked at that time?

Q. Was there any swelling?

A. Yes, it started to swell just a short time afterwards and was very painful.

Q. We have had some testimony read of Dr. Woerner, so we know of course you called him. Do you recall when he saw you, after you got hurt?

(Testimony of Galina M. Smith.)

A. He saw me the next day, Sunday.

Q. The next day?

A. Yes, this was the night of the 15th and 16th, and then [196] it was on the 17th.

Q. You saw him the next day?

A. I called him and he came to my house to see me because I couldn't go to his office.

Q. What was your condition, the condition of your knee then with respect to swelling?

A. Well, it was swollen.

Q. Was there any pain? A. Severe pain.

Q. Did you use your hot water bottle along this period of time?

A. You mean the night I was hurt?

Q. I mean at any time after you first started having this trouble with your knee.

A. Well, I had trouble that night with it, so much so that I asked my foreman, while I was still working, while I was finishing up my shift—I wondered about, when I got home that night, what I would do, so I asked my foreman if he would call my mother-in-law and have her bring a hot pad, a heating pad, to my home so I could use it when I got home that night, and that was what she did.

Q. Was that before or after the accident?

A. That was after the accident. Guy Smith, however, did not call my mother-in-law. He was so busy that he asked Mr. Burhart if he would do it, and he went on out and called [197] my mother-in-law, and she brought up the heating pad that night for me to use.

(Testimony of Galina M. Smith.)

Q. Let's go right along. Did you lose any time after this first hour or half-hour, whatever it was, you lost in the Lumbermen's Hospital the night of the 15th?

A. You mean, did I go right on working the next week?

Q. I want to carry it along in chronological order. What next happened to you?

A. Well, I was off Monday, Tuesday and Wednesday, and then I tried to go back Thursday, Friday and Saturday. I worked three days there, and then I went back on a Monday again and took my lunch and went in, and Mr. Sholes and Guy Smith were talking together as I went in there, and they told me I had better go home, so I did go home.

Q. Who was this that told you to go home?

A. Mr. Sholes and Guy Smith, both.

Q. Is that gentleman, Guy Smith, in the courtroom? A. No, he is not here.

Q. Mr. Sholes is not here?

A. No, Mr. Sholes is not here.

Q. Then, how long did you stay home before you again returned to work?

A. I think it was the next week when I went to the hospital.

Q. How long did you stay in the hospital?

A. Two weeks. [198]

Q. What did they do for you at the hospital?

A. Well, they tried various things. They had my leg elevated and kept me for a while that way. Then, they put heat applications on it from these

(Testimony of Galina M. Smith.)

lamps, and just the sort of thing that they thought would help, but it did not seem to do any good.

Q. After you put in those two weeks at the hospital, did you go back to the same job that you were jumping into, this pit business?

A. No, I didn't go back to the same job.

Q. Did you ever work again in a spot that required you to jump in?

A. No. However, I did go back and try it again. I don't remember the exact date, but I put in about eight days at the mill after that time, on a different job, trying to work again at something different, but I couldn't make it so—I remember the last night I was there, I just couldn't stand it any longer, and I was crying there, and I told the foreman I couldn't, and he said, "Well, if you can't do your work, you had better go home," so I went home. That was the last time.

Q. Then, where did you work, if at all, after you went home? A. I don't quite understand.

Q. I mean, not at the mill; I mean anywhere.

A. Well, the only thing I did then was housework.

Q. About how much had you been making per day at the mill?

A. About 82 cents an hour I was getting when I quit there.

Q. That would figure to how much a day? How much time did you put in a day?

A. It was an eight-hour shift.

(Testimony of Galina M. Smith.)

Q. Did you get extra time for any overtime?

A. Well, time and a half on Saturday.

Q. Time and a half on Saturday?

A. Yes.

Q. What day of the week was May 15th, 1943?

A. That was on a Saturday. That is why I went back and finished the shift.

Q. When you went to work at housework in Bend, how much were you paid?

A. 50 cents an hour, but I couldn't work steady at it.

Q. Why couldn't you work steadily?

A. Because I couldn't stand on the leg that long and do the work.

Q. What was there for you to do? What did you do?

A. It pained and ached so I could not stand it sometimes, after I was on it for a time. It would catch or lock, whatever they call that, so bad sometimes—several times even in the night when I would go to turn over, and if I would be on it very long it would become so tired it bothered [200] me in the night; still troubling sometimes now.

Q. When this knee would pain you, what did you do to relieve it?

A. Well, I would have to sit down and rest and put my foot up on something. I even did that, even when I was working—stop and take a rest. In fact, I had to.

Q. When did you move to Phoenix, Arizona?

(Testimony of Galina M. Smith.)

Just approximately. I don't care for the date exactly.

A. I don't know exactly the date, but it was almost three years ago. Let's see. Wait a minute, now.

Q. This is 1946?

A. It was around Christmas, I believe, in 1944.

Q. You have been there about two years, then?

A. Yes, that is right.

Q. Have you worked there?

A. Yes, I have to work.

Q. What do you do there?

A. I tried various things. I first tried working in a bakery, clerking in a bakery, rather, and then I found I couldn't take the grind of that work in there, so I then went from there down to a variety store and worked there a while, and I had the same trouble there, so then I moved on to that nursing job, the one where I took care of a paralysis patient. I stayed there for fourteen months, because I had a two-hour rest period a day. [201]

Q. You were there for a period of a year, working?

A. Fourteen months I was on that job.

Q. How much did you make while you were there?

A. \$50 a month and room and board for the three of us.

Q. As I understand the situation, you went then to other work, after that, after you had worked there fourteen months?

A. Yes, I did.

(Testimony of Galina M. Smith.)

Q. Then, where did you work?

A. We moved to Phoenix, so my boy could go to school. I had to have other employment, so I tried waitress work for a week, and I couldn't take that at all; it was too fast and too hard on the legs.

Q. Whereabouts are you employed now?

A. I am washing dishes in a restaurant there now.

Q. How much are you making there?

A. \$5 a day.

Q. What is the condition of your health particularly now? I don't care about anything else but your knee. Prior to May, what was the condition of your knee prior to that time?

A. My knees were all right up to that time.

Q. Since this accident, has your right knee ever been just absolutely all right?

A. It never has. There is never a day that it does not ache and trouble me.

Q. Is there any period of time when you are entirely free [202] from pain?

A. Well, there are times, if I rest a lot, and am off of my feet, then I don't have pains.

Q. You do feel pretty good when you are not on it, is that right? A. Yes.

Q. Going back into the mill again, how were you dressed? A. In slacks.

Q. You girls all wore slacks? A. Yes.

Q. I think there is no question about this table top. There was a steel covering at Pit Number 4, on the table there? A. Yes.

(Testimony of Galina M. Smith.)

Q. Do you know how that steel plate was covered? Was it attached to the table itself, the wooden part? Was it attached by bolts or screws?

A. I believe—I am not sure whether it was screws or bolts, but it was something of that order that it was attached with.

Q. When you returned to work that night, did the job you took when you came back, after you had been at the hospital, require any jumping at all anywhere? A. No, sir.

Q. About how large is Number 4? Is it just the same size [203] as the others?

A. I think about the same size.

Q. Were you there after a change was made in the rolls and they put in that belt—the putting in of that belt? Did you work there then?

A. No.

Mr. Sims: I think you may cross-examine.

Cross-Examination

By Mr. Powers:

Q. Just a few questions. You had worked at the Shevlin-Hixon Box Factory for, what was it, about nine months, before this accident occurred?

A. Yes, all of that.

Q. In being around the box factory, you saw others get in and out or over this table, did you not, from time to time? A. Yes.

Q. I will ask you how long you worked near one of these tables before this accident occurred?

A. You mean on the cutoff?

Q. Yes.

(Testimony of Galina M. Smith.)

A. I think it was about two weeks after I was on that particular job.

Q. Is it not a fact you were on that job and a good many jobs, and practically every job that a woman could do around the factory—changed from one job to another? [204]

Mr. Sims: That is objected to. I don't see that it makes any difference. It is not proper cross-examination.

The Court: She may answer.

A. What would you like me to answer?

The Court: Ask the question again.

Q. (By Mr. Powers): Is it not a fact that, while you were working there, you changed jobs very frequently and, at your request, were put on several different jobs?

A. It was customary for the girls to change jobs there, because they were supposed to be able to take the places of the men that left to go to war and they were required to change jobs.

Q. I will ask you: Did you not, on numerous occasions, ask for this job or that job, and that any switching around was at your own request?

A. I don't remember ever asking, but I was put on several different jobs there.

Q. I will ask you if it is not a fact that you knew the nature of the work on this cutoff saw and had known it for many months prior to the time you started working on the cutoff?

A. The reason they put me on the high cutoff—

(Testimony of Galina M. Smith.)

Q. I am asking you whether you knew what work there was to be done there, and how you would get in and out? A. Yes. [205]

Q. You knew about that? A. Yes.

Q. I will ask you: Is it not a fact that just two days before this accident occurred, on May 15th, that was when you asked Mr. Smith to put you on this particular job, that you wanted to work there? A. How is that?

Q. I will ask you whether it is not a fact that, a few days before this accident occurred, this incident, rather, on May 15th you requested Mr. Smith, the foreman, that you be put on this particular work? A. No, sir.

Q. That is not a fact? A. No, sir.

Q. I will ask you whether it is not a fact that you had had considerable trouble with your leg prior to May 15, 1943?

A. I had a little trouble with it a few days before that happened. That was because of the climbing out of that place and jumping down in that I had noticed it, and I did have some trouble just a few days before the accident happened.

Q. You kept on jumping anyway?

A. It was required.

Q. I say, you did keep on jumping?

A. Yes, that was a part of the job. [206]

Q. Will you state to the jury whether, in getting down off the table, you assisted yourself with your hands, or if you sat down so you could slide

(Testimony of Galina M. Smith.)

off, the way you usually slide off the table, or whether you jumped off the table?

A. I really don't remember just how I did go about jumping in there.

Q. You don't know whether you assisted yourself into the pit or not?

A. I couldn't say. I really don't remember the way I did jump.

Q. I will ask you whether it is not a fact that, after this incident of May 15th occurred, and you came back from the hospital, in the presence of Guy Smith and Mr. Burhart, Mr. Guy Smith asked you whether you had had any trouble with this knee before, and whether you did not state to him at that time that you had lots of trouble with this knee before?

A. You say that was after the accident?

Q. Yes, some time in May, the night of May 15th, in his office.

A. I was never in his office after that time, because I couldn't climb the steps to go up there.

Q. I will ask you whether it is not a fact that, whereas, most of the girls ran to the rest room, you walked, and when you got in the rest room there was a keg—this was before May 15th—for your use so you could elevate your leg, and [207] whether or not that had been going on for a long period of time before this accident?

A. No, sir. In fact, I don't even remember the keg.

(Testimony of Galina M. Smith.)

Q. Your husband, Mr. Archie Smith, worked at the Shevlin-Hixon mill at this time?

A. He worked there twenty-two years.

Q. He worked there after you left, did he not?

A. No.

Q. He worked after you left for a while, did he not? A. No.

Q. Didn't he work in September, 1943? I don't know. I understood that was about when it was, so whatever your recollection is——

A. Well, now, I can't tell exactly the date on that because it has been a long time. I really can't recall that date.

Q. Is it not a fact that, last October, last year, your husband was employed as a dishwasher at the "Westward Ho" Hotel in Phoenix?

A. Yes, he tried it. He lasted there three days.

Q. I will ask you whether you had not had swelling in this knee before and were required to wear one of these bandages they wrap legs up with?

A. I did wear one of those bandages after the accident occurred, never before.

Q. Never before? [208] A. No.

Q. I will ask you whether or not it is not a fact that, as early as February, 1943, in the presence of your husband and Mrs. Ann Jeffries, or Ann Jeffries, that you complained of your knee at that time, and your husband was trying to keep you from going to work, in your home?

A. I had never complained of that knee up to

(Testimony of Galina M. Smith.)

that time of the accident. I had never had any trouble with it.

Q. The sawyer that night was Mr. Leacock?

A. Yes.

Q. Your attorneys took his deposition over in Bend before the last trial, is that not a fact?

A. That is right.

Q. As I understand it, you had no doctor's care for your knee, other than the X-rays that have been taken since that time, since that incident in 1943 when you went back to the hospital?

A. That is right. I couldn't afford one.

Q. I just asked you the question whether you did have or not? A. I did not.

Q. I will ask you whether it is not a fact that you did apply for insurance benefits, making in your application the statement that this was a non-occupational condition and, as a result thereof, during the time you were off that [209] summer, you received \$180 over a period of about two months?

A. I received something and I did not quite understand just what it was at the time. It was freely offered by the company to me.

Q. You signed an application to get it, did you not?

A. Yes, they had me sign something. They did not give me time to read it.

Mr. Powers: I believe that is all.

Mr. Sims: I think that is all. Thank you.

(Witness excused.)

Mr. Conway: That is our case, your Honor.
(Plaintiff rests.) [210]

DEFENDANT'S TESTIMONY

Mr. Powers: We would like to offer the testimony, your Honor, of Mr. Leacock at this time.

EDWARD LEACOCK

The testimony of Edward Leacock, produced as a witness, by deposition, at the trial October 31, November 1-2, 1944, was thereupon read as follows:

"Direct Examination

"Q. Your name is Edward Leacock?

"A. Edward Leacock.

"Q. About how old are you now?

"A. I will be 51 in August, the 13th day of August.

"Q. You are just a kid like the rest of us?

"A. Yes.

"Q. You work whereabouts?

"A. Shevlin's Box Factory.

"Q. How long have you worked there?

"A. Well, sir, I will tell you fellows,—I have worked there ever since 1918, off and on. I left a couple of times but most of the time I have never worked anywhere else since I have been in Bend.

"Q. You have been working there continuously for the last eight or nine years?

"A. Yes; seven years the last time.

"Q. You were working there when this lady had trouble with [211] this knee and went to the hospital, I assume. A. Yes.

(Testimony of Edward Leacock.)

“Q. That is the incident that Norval just testified about? A. Yes.

“Q. And you remember the date?

“A. Well not exactly I don’t, but I think it was in May.

“Q. The hospital records here indicate she reported that she got hurt the night, I believe, of May 15th, or morning of May 16th, whenever that was?

“A. Must have been May 15th or May 16th——

“Q. Yes.

“A. (Continuing): ——because we was working nights.

“Q. Who worked with her?

“A. I was working with her.

“Q. Keep any records of which saw you are working on, whether 1 or 9?

“A. When I go to work of a night I generally got orders from the foreman, and he tells me what machines to run,—if it is 1, 2, 3 or 4—I am head sawyer, and he generally tells me which to go up on first.

“Q. Those are just verbal orders? He tells you where to go? A. Yes.

“Q. He will say, ‘Ed, take Number 3 and run off 8-inch stuff,’ whatever it is?

“A. He tells me to take this machine, cut it down so far, and [212] then I move to the next machine. That is the way we work at nights. We cut down for the day shifts.

“Q. You work in a series of spots?

“A. Yes.

(Testimony of Edward Leacock.)

“Q. And as you move, the punk moves with you?

“A. Right.

“Q. How do the punks get in and out of the pits?

“A. Well, I'll tell you—May 15th, that night, he put me on Number 4——

“Q. I wasn't asking about any particular time. I am just asking the question—back in May how did the punks get in and out?

“A. Now listen; there is two ways to come in that machine. One way up the rolls and one way to crawl underneath these rolls.

“Q. What held the rolls off the floor?

“A. These here, up on the stencils, braced.

“Q. Sure they were braced? A. Sure.

“Q. Did you ever go in and out under the rolls?

“A. Yes.

“Q. That was the usual way you did it?

“A. No, I didn't generally do that. I went up the stairs, and down to my saw.

“Q. That was the safe way to do it? [213]

“A. That was the safe way to do it.

“Q. And, as a matter of fact, that is the reason they have that catwalk above you, to get in and out?

“A. Yes.

“Q. No other reason for it to be there; is that right?

“Q. (By Mr. Sims): When is the first time I ever saw you, Ed?

“A. The first time was here, today.

“Q. (By Mr. Sims): To back into this catwalk

(Testimony of Edward Leacock.)

thing,—the reason for the catwalk being there is to provide safe means for you to get to your stalls? That is right, isn't it? A. Well, yes.

“Q. Sure. There couldn't be any argument about that. And when these punks get down into this pit, back down to the ground floor, they use the catwalk and step over your saw and down on the shelf and jump to the floor? Is that right? Now how do they do it? I'll just turn you 'loose.

“A. On Number 4 they had a way they could come in these rolls and walk in to these saws, or she could have went underneath instead of that; I was cutting on Number 4 and I had about half an hour time. Before, Mrs. Smith got a little bit sick. She got a kind of feverish spell and asked me for a drink of water. I didn't have no way to get her any water so Smith come along and got her drink of water out of a cork bottle. After that she was all right. We finished that out in about half an hour. Then I moved over to Number [214] 5; well, she climbed over the top of this gauge and stood on top of the table, which was as big as that (indicating a table in courtroom); seemed to be all right. I was oiling up. She had anyway five minutes and was sitting on top of this table, which she only had about a foot to slide off to stand on her feet, and when I got ready I said 'Ready for your lineup?' She had already slid down off this table which wasn't only about that high (indicating), I should judge.

“Q. The witness is indicating about—do that again, Ed, will you?

(Testimony of Edward Leacock.)

“A. I should say about (indicating).

“Q. A couple of feet? A. Oh, no.

“Q. Twenty inches? A. Twenty inches.

“Q. All right, twenty inches.

“A. And she slid down in there, and I asked if she was ready for her lineups, for her marks for the different grades. Mrs. Smith told me, to hell with the lineup. She said she had hurt her knee.

“Q. Let me interrupt you. Was she in pain, apparently?

“A. She didn't seem to be, no, sir.

“Q. Looked like she was feeling just fine.

“A. Looked like she was feeling all right. [215]

“Q. Didn't cry or anything?

“A. No, she didn't cry; so I said to her, 'Are you ready for your lineup?' She said, 'To hell with the lineup, I have hurt my knee.'

“Q. Yes.

“A. So she asked me to help her, and I didn't, because I was busy with my lineup, and Smith came along——

“Q. Your foreman?

“A. Yes, Smith is the foreman; and she went out under the rolls, underneath, stooped over and went out underneath, and Smith took her up to the office and then I was through.

“Q. Did you see the witness Hufstader, whatever his name is, leave with her?

“A. No, I didn't; I was busy; I was—but I seen her when she came back. Mr. Smith came back from the hospital, and I guess they were gone an hour

(Testimony of Edward Leacock.)

or something like that, I can't say, but she finished her shift out that night on a different job; so that is all I could tell about that.

“Q. Did you ever make a written report of this accident to anybody? A. No, never did.

“Q. Did the general plant manager, Mr. Myers, call you in to talk to you? A. No.

“Q. Did you go in and talk to Mr. Myers? [216]

“A. No.

“Q. You didn't see him Saturday?

“A. I never seen nobody, until I got my subpoena.

“Q. Then what did you do?

“A. Well, let's see, that was Saturday night when I was ready to go to work; and Mr. McCauley drove up and said, 'I want to see you, Ed.' I said, 'Okay.' I got in the back end of the car and he showed me the subpoena he got. Also give me \$2.10. I said 'I should worry about the \$2.10. I don't need it.' He said, 'Well, this is a subpoena, Ed.' So I went over and worked until 9 o'clock and I had worked a double shift already, and come home at 9 o'clock and went to bed.

“Q. You have never talked to anybody about this? A. No.

“Never did to anybody?

“A. Nobody except,—well, I'll tell you. I guess about three weeks ago the foreman did come tell me Mrs. Smith sued the company, but I didn't think it had or I had anything to do with it, or anybody else. It wasn't my business.

(Testimony of Edward Leacock.)

“Q. You didn’t feel like you had hurt her any, did you, Ed? A. No.

“Q. When did you talk to Mr. Veazie about this?

“A. Let’s see; it was this afternoon right here, wasn’t it?

“Q. What is your best recollection? He will tell you, no [217] doubt, but what is your recollection of when you talked to him?

“A. It was right here in the courtroom this afternoon, wasn’t it?

“Mr. Veazie: Use your own recollection. Don’t you remember talking with me and Mr. Myers on Saturday? A. Oh, yes, we did.

“Q. (By Mr. Sims): What time did you talk to him Saturday?

“A. Well, let’s see, it was about two o’clock Saturday.

“Q. You had forgotten a moment ago that you had talked to Mr. Myers and Mr. Veazie?

“A. Yes.

“Q. You just overlooked that?

“A. Yes, I just overlooked that.

“Q. Think you might also have forgotten about how Galina Smith got in and out of that pit that night? A. No.

“Q. How does it happen your recollection of this transaction a year ago of how she sat down and very gently got onto this pit is so clear, and vivid, but even last Saturday’s transaction is obliterated, and Mr. Veazie had to refresh your memory? Why is that?

(Testimony of Edward Leacock.)

“A. Well, I have to change these machines every night.

“Q. Yes.

“A. And I have my lady partners with me all the time, and [218] Mrs. Smith was practically the only lady that ever got hurt. She claims she got hurt.

“Q. Yes.

“A. And my other ladies get in and out or crawl underneath or crawl up on top and don't seem to be bothered.

“Q. That still don't explain how you remember what happened a year ago so much better than what happened Saturday.

“A. Well, I could remember that as well as going to work.

“Q. As a matter of fact, you were busy with the saw getting ready to go to work? A. Yes.

“Q. You were not standing there watching what she was doing? A. Well, yes, I'll tell you——

“Q. (Interrupting): You don't know whether——

“Mr. Veazie (Interrupting): Let him answer the question.

“A. No; as I told you before, she climbed over the stop and stood on top of the table.

“Q. Yes.

“A. And set down there, because I had five minutes to oil up.

“Q. To refresh your recollection, isn't it true she jumped down, and hurt her knee, and sat down;

(Testimony of Edward Leacock.)

and that is when she said, 'I am hurt and I can't work.'

"A. She didn't tell me that. My gosh! She just slid off [219] the table and she didn't have twenty inches——

"Q. Yes.

"A. ——there; and she claims that—Well, then, she felt of her knee, and I got my lineup and was asking her ready for her lineup when she says, 'To hell with the lineup. I hurt my knee.' I said—well, just like before, Smith come along, and she crawled underneath the rolls and went with Smith, and I never seen her any more only after she come back from the hospital.

"Q. You say she didn't have to crawl underneath, she could have walked out of there?

"A. She could have walked between the other rolls, if she wanted to, but climbed underneath to get out. Smith told her to come out and he would take her to the hospital.

"Q. The witness we just had testified the rolls were up against that.

"A. They are different then, now.

"Q. I know you have it fixed now so this wouldn't happen.

"A. But these rolls were—We had enough for me or you or anybody else to walk up between Number 5 and 6 cutter saw, either that or you could climb underneath.

"Q. Yes.

"A. Or overhead, and step on your table.

(Testimony of Edward Leacock.)

“Q. Why would people go in and jump three feet to the floor when they could walk right in?

“A. I don’t understand it, either.

“Q. Was that a company instruction, they should do that to see how active they were, or something?

“A. It was just what way she wanted to do it.

“Q. There was no bench to step off the work-bench or shelf down to the floor?

“A. No, there could not be; it fastens right here and our table is along here.

“Q. Why do you say there couldn’t be when, as a matter of fact there is such a bench in quite a few of those pits, or was—isn’t that true?

“A. There has never been no benches that I know of where a woman would be sitting on this table and put her foot on the bench.

“Q. Forget about sitting on the table; there is a bench it is possible to step on all the way down to the floor, they come up over your saw?

“A. Yes, but she wouldn’t have done that.

“Q. I know, but why did you say a moment ago there could not be when there is.

“A. There wouldn’t be in the way of her working there.

“Q. In a number of these pits there is such a bench, isn’t there? A. No.

“Q. Never was such a bench in any of the nine pits? [221]

“A. Never was in any of them where a woman could sit down.

“Q. Forget about this woman business, forget

(Testimony of Edward Leacock.)

about the punks entirely. In some of these pits was a bench that anybody getting in and out of the pit could have stepped on, isn't that true?

"A. Listen——

"Q. (Interrupting) Answer 'Yes' or 'No', please. A. I will say 'No.'

"Q. There never has been a bench in any of those pits? A. No.

"Q. And there couldn't be?

"A. No, couldn't be.

"Q. Couldn't be anything of that kind? So that any witness that testified, like Mr. Schueler, or any of those gentlemen who testified there was such a bench in some of those pits would just simply not be telling a fact, is that right?

"A. That is right.

"Q. Did you testify that you got Smith to come and get her after she got hurt?

"A. After she——

"Q. Yes, when she said—whatever this expression was—that her knee hurt and she wasn't going to worry about the lineup, you told Smith about this? A. Smith was coming up there.

"Q. Then you waved him over? [222]

"A. Waved him over and told him to take her.

"Q. Whereabouts had you been working before you went to work in Number 4 that night?

"A. I wasn't working at no other place.

"Q. That is where you started?

"A. That is where I started.

(Testimony of Edward Leacock.)

“Q. About how long would it take you to change saws from four to five?

“A. About every two hours.

“Q. You change about every two hours?

“A. Well, yes; it is just according to how my lumber is piled up; maybe takes me three hours; maybe four hours.

“Q. Did she ever complain to you that her knee was hurt before this time?

“A. No, she never did.

“Q. That is the first time she ever said her knee was bad?

“A. Yes; but I know in Number 4 several times that she had kind of a little fainting spell, feverish, hot, and wanted water, and I wasn't able to go get water right then and I told her to go get it herself. Smith got her water this night. So the next—after we moved over to Number 5 why she was all right. Seemed to be all right, until she slid down into the pit.

“Q. Until she jumped into the pit?

“A. She didn't jump down, slid off onto the floor. [223]

“Q. Were you just standing there watching how she was—

“A. (Interrupting) Yes, I had my lineup there.

“Q. Then did you make a practice of watching how the punks got in?

“A. Yes; the foreman tells me to watch them pretty well around the saws.

(Testimony of Edward Leacock.)

“Q. Do they quite often get hurt jumping into the pit? A. Never have.

“Q. This is the first time; but now there is a change so the rolls don’t enclose the pit?

“A. What?

“Q. They have been taken out entirely, haven’t they? A. No——

“Q. But that is changed?

“A. No, they are there yet.

“Q. Behind the pit? A. Yes.

“Q. Just like it was? A. Yes.

“Q. Haven’t changed?

“A. There is a change, too.

“Q. But the rolls are still there? A. Yes.

“Q. And all your testimony would be just as accurate as that statement? In other words, if you are wrong about the [224] rolls you are about the other statements you have made?

“A. No, I can’t be wrong about her getting down to the floor.

“Q. You couldn’t be mistaken about the rolls being there? A. The rolls are there.

“Q. I was there this morning and they were not there. A. They aren’t?

“Q. No.

“A. Maybe they have been changed since Monday.

“Q. Maybe there have been changes?

“A. I don’t know; I’ll tell you—I didn’t work Saturday night, and I understand the construction crew was going to change the rolls. Maybe they

(Testimony of Edward Leacock.)

did. I don't know. I haven't been over there, but the last time I was there was Friday night until 1:30 and then them rolls was behind there, where they put their cuts on and they go on down and out, but there may be a chance the construction crew come along and changed them since I was there.

"Q. You haven't seen this live belt under the bench at all? A. No, I haven't.

"Q. But you do remember now you did talk to Mr. Myers and Mr. Veazie Saturday about this case? A. Yes.

"Q. And you had forgotten that when you first started to testify? [225] A. Yes.

"Q. But did they go over the answers about this business of her sitting down and getting in there—did you go over that with Mr. Myers?

"A. No.

"Q. Didn't tell Mr. Myers about that?

"A. I did, I told him just what I knew about it, and what I am telling you here now.

"Q. You told them about her sitting down and getting in easy like? A. Yes.

"Q. So you didn't understand about how she did break this cartilage of this knee?

"A. I didn't understand why she did that?

"Q. How did she get in there the first time, in this pit Number 4?

"A. When we first started work?

"Q. Yes.

"A. She went underneath.

(Testimony of Edward Leacock.)

“Q. She usually went in underneath the rolls?

“A. Yes.

“Q. What holds the rolls off the floor?

“A. On the frames.

“Q. How close are the frames?

“A. Three or four feet. [226]

“Q. Quite a ways apart?

“A. Quite a ways apart.

“Q. How high are the rolls above the floor?

“A. That high. (Indicating).

“Q. About twenty inches? A. Oh, 30.

“Q. You are indicating what you did for the bench, above the floor?

“A. Our bench and them are practically even.

“Q. Why is it, when you are having her get off the bench onto the floor you say it is twenty inches, but when you want a place for her to get under the rolls into the pit you boost it and make it thirty or forty inches?

“Q. Why do you do that? A. What?

“Q. You say the bench and the rolls are the same level?

“A. Well, they practically are.

“Q. Yet you testified this bench she got off of onto the pit was about twenty inches? And the rolls she was supposed to go under was about thirty inches. A. You got me wrong.

“Q. Yes, obviously. Straighten me out.

“A. This bench and rolls is practically the same, about 30 inches.

“Q. Yes. [227]

(Testimony of Edward Leacock.)

“A. But when she was sitting on the table where she had to slide off she wouldn’t have over twenty inches to step down on the floor.

“Q. I see; the 20 inches was from her feet to the floor? A. Yes.

“Q. She is pretty short-legged, isn’t she?

“A. Not so bad.

“Q. Ed, how many times did you get in and out of Number 4 that night, before this accident?

“A. Me?

“Q. Yes.

“A. Well, I’ll tell you; I generally work about an hour or an hour and a half without moving, without going after a drink of water, or anything.

“Q. Well, make it an hour; how many times had you changed before this accident?

“A. Just once.

“Q. Just once?

“A. Just once, from 4 to 5.

“Q. So this punk had just been in there one other time that night, in four, then in five, and back to four? A. No.

“Q. All right; how many times?

“A. I moved from Number 4 to Number 5. I never go back.

“Q. I see. [228]

“A. And I was moving from Number 4 to Number 5, and it is generally about five minutes to oil up and get ready.

“Q. Yes.

“A. She was sitting on the table when she kind

(Testimony of Edward Leacock.)

of slid off on the floor and claims she hurt her knee, and she asked me to help her, and Smith come up. He took care of her and this gentleman over there took her to the hospital and I didn't see her until she came back from the hospital and worked the rest of her shift out.

“Q. How long, ordinarily, does it take you to change saws—about five minutes? A. Oiling?

“Q. No, how much time from the time you quit at 4 and start at 5?

“A. A fellow can use his own judgment.

“Q. How much, ordinarily?

“A. I would say five minutes.

“Q. And in that five minutes she has to get out of the pit, no matter how she does it, and be ready to go?

“A. Yes. In other words, we give the punks their time about that, us fellows do, the sawyers.

“Q. How many sawyers were on the job that night, Ed? A. Two.

“Q. You had the first five and Hufstader the next five? A. Yes, wasn't that right? [229]

“Q. How many punks that night?

“A. Lady punks?

“Q. Yes.

“A. One for me and one for him.

“Q. Just two on the night shift?

“A. Yes, but then if one of the punks gets sick we can always get another one.

“Q. Where do you go to get the other one?

“A. Ask the foreman.

(Testimony of Edward Leacock.)

“Q. He is there to provide you with lady punks?

“A. Yes.

“Cross Examination

“By Mr. Veazie:

“Q. You haven’t been over to the shop today, have you, Mr. Leacock?

“A. No, I haven’t; I haven’t been over since Saturday, or since Friday night.

“Q. You wouldn’t know anything about any changes that have taken place since Friday night?

“A. Well, I’ll tell you, Sholes, the superintendent come to me Friday night. Generally on the cleanup I clean up every other Friday night for four hours. He told me to clean up Friday night because the construction crew was coming along and change these rolls and belts, and I don’t know how they have them changed. I haven’t been over there since. [230]

“Q. About these benches, you have said that there was no bench that stood where a woman could step off the table or platform onto the bench, that is to say—if the bench was in front of the table where she worked, it would be in her way, wouldn’t it?
A. Yes.

“Q. Were there benches in those places where the punk stands?

“A. In some that are to pile stuff on, but they are out of the road where she stands.

“Q. Movable benches? A. Yes.

“Q. They can be put where you want them?

“A. Yes.

(Testimony of Edward Leacock.)

“Q. But they are not left in front of the tables for the purpose of being stepped on?

“A. No.

“Q. That is what I understood you to mean. Previous to the night of the 15th of May you had said that on that evening she had complained about feeling pains or something of the kind?

“A. Yes.

“Q. Had she ever complained to you before about her health or any trouble she had?

“A. Well, no, she never did; only except that night that she got a little feverish and she wanted a drink of water. [231]

“Q. How long had she been working with you as a punk? A. About a month.

“Q. And she hadn't complained during any of those times? You heard something about the—you say Number 4 they could come in between the rolls. I wish you would explain that a little further.

“A. You mean to come into Number 4 or Number 5 or 6?

“Q. Yes.

“A. The same—the way to come into them rolls?

“Q. The way you said that anyone could come in between the rolls?

“A. At that time you could come up these rolls from back down on the floor, away back from where the lumber goes to be piled on the trucks—come up them and into 5 and 6, either that or you could go underneath this roll.

“Q. Yes. A. You could go underneath.

(Testimony of Edward Leacock.)

“Q. As I understand it, there were two sets of rolls, and the space in between them was such that anyone could walk in between them?

“A. Yes.

“Q. And then there was, according to what you said a while ago, enough space under the rolls so that anyone who wanted to crawl under, could?

“A. Yes. [232]

“Q. And you could go up on the catwalk and come in that way? A. You can, too, yes.

“Q. Are the punks told which way they should go, or left to do as they please?

“A. They can go as they please.

“Mr. Sims: Object, and move it be stricken; it calls for a conclusion; how would he know?

“Q. You say they are not told. You didn’t undertake to tell them? A. No.

“Q. What ways do the punks ordinarily get in, or do they have any regular way? What is their custom?

“A. Well, they can go underneath these there rolls or up the steps, same as I do, and climb over and stand on the table and down onto the floor.

“Q. Yes.

“A. I have a lady, been working with me about four months, and that is the way she does—comes up the steps with me, and slides over the steps, onto the table, and slides to the floor.

“Q. As far as you are concerned, you are working clear above the table? The place you stand is about on a level with that table, is it not?

(Testimony of Edward Leacock.)

“A. No, I am up higher. I am a sawyer; I am back.

“Q. The place where you stand is higher than the table we [233] are talking about where Galina Smith sat down and slid off? A. Yes.

“Q. So, in going to your place of work you naturally go up the catwalk? A. Yes.

“Q. And it is the same thing with the other sawyers, is it not, that they use the catwalk practically always to get to their place of work?

“A. Yes.

“Q. Did you see anything of Galina Smith—well, she came back and worked the rest of that shift, but she worked on a different job; I understand you didn’t see her again that night?

“A. That night?

“Q. Did you see her afterwards?

“A. I seen her at the hospital once. I just stopped in, I wanted some medicine for himself and stopped in, but she was getting ready to go home.

“Q. Aside from that——

“A. What?

“Q. Have you seen her about, on the streets or anywhere?

“A. I met her one time downtown here about over a month ago, maybe not that long, and I asked her if she was working, and she said ‘No, you know I can’t work. I hurt my knee.’ I had forgotten all about that. [234]

“Q. Did you observe her at that time, to see whether she seemed to be lame or not?

“A. Well, I couldn’t say.

(Testimony of Edward Leacock.)

“Q. Did any of the punks ever climb in over the rolls?

“A. Ever climb in over the rolls?

“Q. Yes.

“A. No, they never did; they couldn't climb over those; these rolls are live rolls, see; and I had a boy one time working for me—that was before any of the ladies worked with me, and he used to fool with these rolls with his hands, and got his hand caught there. Finally we got it out; it didn't hurt it much. Then the millwrights put up a safety board across the whole rollers in front where they turn around to put these boards on. The board is fastened around over the rolls and down at the floor, so they cannot climb over.

“Mr. Veazie: I think that is all.

“Redirect Examination

“By Mr. Sims:

“Q. Ed, you say there was a board put in there by the safety boys so that there was a board between the place where these lady punks work and the rolls; did you mean that?

“A. Well, I'll tell you——

“Q. First tell me yes or no. Do you mean there was a board put in there?

“A. There was a board put in there. [235]

“Mr. Sims: That is all.

“Recross Examination

“By Mr. Veazie:

“Q. Describe what the board was—where it was and how it was.

(Testimony of Edward Leacock.)

“A. It was after this boy working with me had hurt his hand, the foreman put these boards in here so they couldn’t put their hands underneath the belt or underneath or fool with the belt at all.

“Q. How far down—where was the top of that board and where did the bottom of it come?

“A. This board would reach from the top of the table to about there (indicating).

“Mr. Sims: The witness is indicating a distance—how far from the floor?

“The Witness: Twelve to fourteen inches.

“Q. (By Mr. Veazie): Did that board extend clear across?

“A. No, it didn’t, it left room for the punk to crawl underneath the roll, or underneath.

“Q. The board didn’t block the passer, under the rolls?

“A. No, he could crawl under here or over here; this board was only about that wide. She could crawl over here or over here (illustrating).

“Mr. Veazie: That is all. [236]

“Redirect Examination

“By Mr. Sims:

“Q. You say she would have four or five inches at either end to crawl in?

“A. More than that.

“Q. What time did you come to work that night, Ed, the night of this accident?

“A. Five o’clock.

(Testimony of Edward Leacock.)

“Q. You worked whereabouts when you came to work? A. What?

“Q. What spot did you work in?

“A. Number 4.

“Q. How long did you work there?

“A. I worked there until about 7 o'clock.

“Q. You worked three hours straight in Number 4? A. No.

“Q. All right; where did you work?

“A. It wasn't three hours.

“Q. All right, how long did you work?

“A. Two hours.

“Q. All right, you worked two hours in 4, then where did you go? A. Number 5.

“Q. Who was the lady punk in 4 when you started work? A. Mrs. Smith. [237]

“Q. How did she get into 4 pit?

“A. The first time she come underneath these rolls.

“Q. How did she get out of there?

“A. When she got ready to go out she could go——

“Q. (Interrupting) How did she go out, do you know? A. When she got hurt?

“Q. No; how did she get out there the first time?

“A. Well, she got up on the table.

“Q. Yes.

“A. And come up the top of my gauge.

“Q. And then up the catwalk? A. Yes.

“Q. Then how did she get into Number 5?

(Testimony of Edward Leacock.)

“A. When I changed saws to go into Number 5 we done the same thing, come up the catwalk and got over on the table.

“Q. Jumped down into the pit?

“A. She didn’t jump down into the pit.

“Q. She got into the pit?

“A. She got into the pit.

“Q. Then how did she get out of Number 5?

“A. She went out underneath the rolls.

“Q. Crawled underneath the rolls?

“A. Yes, when Smith come out she crawled out underneath the rolls.

“Q. You wrote all this down? [238]

“A. No, I didn’t.

“Q. How do you remember it so good?

“A. That is easy to remember, man.

“Q. I know, but how do you remember that particular thing so clearly, but when you saw her down the street a few days ago you had forgotten there was such an accident?

“A. She thought her leg then was better.

“Q. How many times has the superintendent of this mill called you in and had a conference about this? A. The superintendent?

“Q. Yes, Mr. Myers? A. Just once.

“Q. Just once. Thank you, that is all.

“(Witness excused.)”

Mr. Powers: Guy Smith’s deposition was likewise taken at Bend. We would like to offer it at this time. I think we ought to state to the jury

when and where these depositions were all taken. They were taken at Bend, but I don't know just when—1944, in April. [239]

The deposition of

GUY A. SMITH,

a witness on behalf of the defendant, was then read as follows:

“Direct Examination

“Q. Mr. Smith, how long have you been employed by the Shevlin-Hixon Company?

“A. Approximately twenty-five years.

“Q. Has that been continuous?

“A. I have been there eighteen years continuously.

“Q. About how old are you now?

“A. Forty-one.

“Q. You are married and have a family?

“A. I am married.

“Q. No children? A. No children.

“Q. What are your duties at Shevlin-Hixon?

“A. Foreman.

“Q. As foreman what are your duties?

“A. I supervise the running of the box factory.

“Q. You are acquainted with Galina Smith?

“A. Yes.

“Q. Was she employed there in May, '43?

“A. Yes.

“Q. Did you see her at the time of the injury?

“A. Yes, I saw her right after.

“Q. Was she in apparent pain at the time?

“A. She was limping some.

(Deposition of Guy A. Smith.)

“Q. Who did you send her to the hospital with?

“A. Norval Hufstader.

“Q. At that time do you know which spot she had been working?

“A. She was working on Number 5 cutoff.

“Q. Did you see her at work? A. Yes.

“Q. Did you make any written record of where she was working?

“A. No, I didn't make no record of it.

“Q. That is just a matter of memory then?

“A. Yes.

“Q. Who was she working with?

“A. Ed Leacock.

“Q. Had you instructed the lady how to get in and out there?

“A. No, I never instructed her; as a matter of judgment she had two or three different ways of getting in.

“Q. Had you ever told her the way to get in was to step in and jump to the floor? A. No.

“Q. Had you broken her in on the job?

“A. Yes.

“Q. Did she ask you how to get in?

“A. No.

“Q. Did you tell her ‘just jump’? [241]

“A. No.

“Q. As I understand, you don't think she got hurt? A. No.

“Q. Don't you think anything is the matter with the knee?

“A. I wouldn't say that; she might have some-

(Deposition of Guy A. Smith.)

thing wrong with her knee, but I don't think she injured it over there.

"Mr. Sims: That is all.

"Cross-Examination

"By Mr. Veazie:

"Q. You were called after she complained her knee was hurt,—you were called by Mr. Leacock, or somebody? A. Yes.

"Q. Did you go where she was?

"A. She came over where I was.

"Q. Then you arranged to have Norval Hufstader take her to the hospital? A. Yes.

"Q. What different ways were there of getting into that Number 5 saw, the place where the punk stands?

"A. There was, I would say, three different ways: You could go over the top and down on the table and then slide down on the floor level, or go under the belt, or have went between two rolls from Number 5 cutoff and walk right straight to her position.

"Q. Did you ever indicate to her in any way—Suppose she [242] went up to your catwalk and came over the railing onto the table—did you ever tell her, or indicate how she should get from the table to the floor?

"A. No, I never did advise her how to get in there.

"Q. What is the height of the table above the place where she stood?

(Deposition of Guy A. Smith.)

“A. It is approximately thirty-three inches from the table top to the floor.

“Q. And the rolls are about the same height, I believe?

“A. The rolls, I would say, are maybe a little lower, maybe approximately that height, yes.

“Q. Had Galina Smith ever conveyed to you, before the 15th of May, 1943, about trouble with her knee?

“A. She had complained about her side, her whole side; she complained one night; she thought possibly she had a stroke over there.

“Q. Well, did she or did she not, ever speak particularly of having trouble with her leg or with her knee?

“A. No, she never really mentioned her knee before that time.

“Q. But after the accident did she discuss that subject with you, the question whether she had had previous trouble with the knee?

“A. Yes, when she came back from the hospital I asked her if she ever had trouble with the knee before; and she said yes, considerable trouble. [243]

“Q. Did she say when and where that trouble had occurred?

“A. No, she didn't tell me anything about that; she called it a trick knee, is what she told me.

“Q. Did she say anything about where she had previously lived? A. No.

“Q. Or where she might have gotten this knee trouble? A. No, never told me that.

(Deposition of Guy A. Smith.)

“Q. Had she ever complained—you say she spoke, I believe, something about, like a numbness in her side, before the accident occurred?

“A. Yes.

“Q. Did you ever hear of any previous complaints about her health?

“A. Well, she said a few times she didn’t feel good, said she felt faint a lot of times.

“Q. Do you remember how long she had been on that particular job as a punk?

“A. No, I don’t remember just how long she was on there.

“Q. How many jobs had she had in the factory?

“Mr. Sims: Objected to; it doesn’t make any difference.

“A. Oh, I would say possibly four, before that.

“Q. The other witnesses have indicated she came back the night of the 15th of May and finished the shift. That is correct, is it? [244]

“A. Yes.

“Q. What job did you put her on?

“A. On the resaw.

“Q. Did she seem able to perform that work all right? A. Yes.

“Q. When she was—Then she came back again to work for a while in August, I believe.

“A. Yes.

“Q. What was her job then?

“A. She was off-bearing and resaw at that time.

“Q. How long did she work that time in the box factory?

(Deposition of Guy A. Smith.)

“A. I would say possibly a little over a week, maybe eight days or so, I don’t remember exactly.

“Q. What appeared to be her physical condition at that time?

“A. Seemed to be able to work all right, never complained about her knee.

“Q. Show any signs of lameness?

“A. Not a bit.

“Mr. Veazie: That is all.

“Redirect Examination

“By Mr. Sims:

“Q. You remember the time she complained about her knee, she said, ‘Can’t you fix some kind of a step or some way you can get in and get out of the pits without jumping?’

“A. I don’t remember her ever saying anything like that. [245]

“Q. You would not say she didn’t?

“A. I don’t think she said it.

“Q. Are you in considerable pain?

“A. Well, I am uncomfortable.

“Q. Just do the best you can. She seemed to be quite sure she had discussed that, and I wondered if you wanted to be that definite.

“A. I just don’t remember anything about it.

“Q. You don’t just recall?

“A. No, I don’t.

“Q. You could not be mistaken?

“A. I won’t say she did not say it; I don’t remember it.

(Deposition of Guy A. Smith.)

“Q. This Number 5 place—there is testimony it was in 3 and in 4. There is no testimony from any witness that it was in 5—

“Q. How do you fix 5 instead of Number 3, 6, 4 or 1? A. How do you mean I ‘fix’?

“Q. How are you so positive it was 5?

“A. I recall the night it happened, it was 5.

“Q. You did not see her in the pit?

“A. No, but I ordered her to go there; she worked in Number 4 before and she worked in 5.

“Q. The same night? A. Yes.

“Q. You specify where she was to work? [246]

“A. Yes.

“Q. And not Ed Leacock?

“A. I tell Leacock; I don’t tell her.

“Q. Then you didn’t really mean what you said when you said you told her yourself?

“A. No, I don’t tell her; I tell him.

“Q. You made no record of this, didn’t write it down? A. No.

“Q. Didn’t report to anybody of it?

“A. No.

“Q. You didn’t make any record of the fact that she got hurt at that particular time?

“A. I usually make a record of things like that, but didn’t on that night, because I didn’t think it was very serious.

“Q. Since you decided there was nothing the matter with her you didn’t pay any particular attention to it?

“A. Not after she came back from the hospital.

(Deposition of Guy A. Smith.)

“Q. You did decide from all that it wasn’t necessary? A. Yes.

“Q. How many times did you talk to Mr. Myers and Schueler and Mr. Veazie about this?

“A. I talked to Mr. Veazie once, Mr. Myers twice.

“Q. What was the occasion about the conversation twice with Mr. Myers?

“A. He asked all about the facts, how it happened, and so [247] on.

“Q. And you went over your answers at that time, of course? A. Of course.

“Q. You say she told you she had a bad knee and it had been bad for a long, long time?

“A. She told me she had trouble before with it.

“Q. To refresh your recollection, didn’t she say there was sort of a drawn feeling—hurt?

“A. She called it a ‘trick knee,’ whatever that is.

“Q. But she did not tell you, did she, this knee ever locked and caused her a lot of pain and caused her to fall, and that sort of thing?

“A. No, she never said that.

“Q. You know the Number 5 business, but don’t recall how long she had been working as a punk there? A. Not exactly.

“Q. But you do remember it was Number 5?

“A. Yes.

“Q. But you don’t remember whether she worked two weeks or a month as a punk?

“A. No.

(Deposition of Guy A. Smith.)

“Q. How do you suppose you remember it was Number 5, so distinctly?

“A. I can remember where this accident occurred.

“Q. But you didn’t think there was any accident? [248]

“A. No, I didn’t think there was any accident. I figured she hurt herself, of course.

“Q. Well, what did you think?

“A. I figured she might have aggravated an old injury.

“Q. But you did not consider it an accident?

“A. No.

“Q. And consequently made no note of it?

“A. No.

“Q. At what stage of the development did you decide there was an accident?

“A. I never knew there was an accident until she turned it in to the office.

“Q. She always told the same story; she hurt her knee on the job that night?

“A. I never talked to her.

“Q. How many sawyers on the job that night?

“A. Well, I would say around four.

“Q. You know there were four, as a matter of fact? A. Usually have four, as a rule.

“Q. How many punks? A. Four.

“Q. You could not be mistaken, and only had two? A. Two punks?

“Q. Sawyers and punks?

“A. No, I couldn’t, I can’t recall. [249]

(Deposition of Guy A. Smith.)

“Q. Your best recollection is there was four?

“A. That is what they usually have, yes.

“Q. Why don't you recall that? You know it was Number 5, but you don't know how many sawyers there were. Why is that?

“A. Sometimes we haven't that many there; sometimes more.

“Q. Sometimes you don't run the mill, but the truth is you don't know how many sawyers were there the night she got hurt?

“A. I couldn't answer that.

“Q. Mr. Myers didn't go over that with you, is that it? A. No.

“Q. How long had she worked in Pit Number 5?

“A. That night?

“Q. Yes.

“A. She had just got down on the job, she had been working in 4 before.

“By Mr. George:

“Q. When she works on the off-bearing or rip-saw what are her duties? A. On the rip-saw?

“Q. I understood you to say you put her on the——

“A. (Interrupting): Yes, her duties are taking the shocks away from the rip-saw and putting them on the truck.

“Q. She did all right that night?

“A. Yes. [250]

“Q. She pushed the truck?

“A. As far as I know.

(Deposition of Guy A. Smith.)

“Q. Didn’t get someone to push it for her?

“A. She has help, a helper that helps her.

“Q. But the helper didn’t do it all that night?

“A. I don’t remember. I guess she did all right, so far as I know she performed her duties all right after she came back to work.

“By Mr. Sims (resuming):

“Q. Are you the foreman that told her you though probably she had better quit?

“A. Yes.

“Q. What was the occasion?

“A. She kept complaining, said she couldn’t seem to do any good over there; I asked her if she wasn’t able to do the work why didn’t she quit.

“Q. She complained about her knee, and she had so much pain she couldn’t do anything?

“A. Never complained about the knee a bit.

“Q. As far as you know she hasn’t any complaint at all?

“A. She told me she felt exhausted, and felt faint all the time.

“Q. But never told you there was anything the matter with her knee?

“A. Not when she quit, no, sir. [251]

“Mr. Sims: I think that is all.

“By Mr. George:

“Q. Did you have charge of safety in the mill?

“A. Yes.

“Q. Do the doctors’ reports come back to you?

“A. No.

(Deposition of Guy A. Smith.)

“Q. You don’t know when she went to the hospital,—what the hospital says is wrong with her?

“A. No. I asked her the night she went to the hospital. I didn’t want her to work. She said they told her to go back to work.

“Q. You, in the mill, would know that?

“A. I don’t know, unless they have a record of it in the office.

“Q. You would not know the reports came back there that said she had a floating semilunar?

“A. No.

“Mr. George: That is all.

“Mr. Veazie: That is all.” [252]

ANNA JEFFRIES

was thereupon produced as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Powers:

Q. How long had Mrs. Smith been working at this particular type of work?

A. Mrs. Smith had not worked on this job very long.

Q. What is the fact as to how she got on that job?

A. Well, I will tell you how Mrs. Smith got on that job. There was a young girl there—I don’t know just how to say this, but there was a young girl working there——

(Testimony of Anna Jeffries.)

Mr. Sims: If the Court please, I don't think it makes any difference how she got on the job.

Mr. Powers: I am asking her if she knows.

Q. I am asking you if you know. Did you ever hear Mrs. Smith ask to be put on that job?

A. Mrs. Smith asked for the job.

Q. Whom did she ask?

A. She asked Guy Smith.

Q. You heard that, did you? A. Yes.

Q. Had you seen Mrs. Smith around there for some time? A. Yes.

Q. State to the jury whether Mrs. Smith ever complained to you or indicated she had had trouble with her leg before May 15, 1943?

A. Yes, sir. In February, we had a terrible snow storm [268] and I was snowed in and forced to walk to work. I went down to Mrs. Smith's house, and she asked me if I ever had my legs swell, and I told her my legs never swelled but my feet did, and she showed me—she said, "My knee is swollen. I don't know what it is—whether it is from standing or not."

I said, "Well, you had better get you a hospital ticket and see about it, because it could be milk leg."

Q. Was that in February,—what year?

A. That was in February of 1943.

Q. Did you ever see any other evidence, before this incident of May 15, 1943, indicating she had trouble with her knee?

A. Yes, Galina was in her home—Galina showed

(Testimony of Anna Jeffries.)

me her leg, and it was swollen. She had a band on it of some kind—oh, they use them to wrap their legs if they have varicose veins or something. She had that on. It was in the wintertime. I saw this in Galina's own home.

Q. Around the mill, did you see her favor her leg at all? A. Yes, she did.

Q. When was that and where?

A. In the rest room. We have one-half hour for our dinner period. Instead of an hour we have one-half hour and, naturally, when that whistle blows you are allowed to go to the clocks and punch out. I never ate very much in the ladies' rest room. We have a bed and we have two chairs in [269] there, and there was enough girls to take them up. Galina happened to find a nail—happened to find one of these nail kegs and she brought it into the rest room, and she always tried to get her a chair, and then she would put her feet up on the nail keg, and she would sit in the chair and eat her lunch and put her leg up on the nail keg. She said, "We have to get some benches in here," and so she brought in some boards—I don't know if she asked the millwright to make the benches or not but, eventually, we got benches in there.

Q. She put her leg up on the keg? Was that before this accident? A. Yes, sir.

Q. Of May 15th? A. Yes.

Q. You were there that night and you saw her?

A. Yes.

(Testimony of Anna Jeffries.)

Q. Tell the jury whether this was in Number 5 or Number 4 where the incident occurred?

A. It was in Number 5.

Redirect Examination

By Mr. Powers:

Q. You saw Mrs. Smith come back, after she went to the hospital? After she went to the hospital that night?

A. I saw the accident, if you would call it that. I saw Mrs. Smith the night she came back from the hospital.

Q. What kind of work did she do after she came back that night? [277] A. She punked.

Q. Did I understand you to say you saw her when she went down on this floor? A. No, sir.

Mr. Sims: She said she saw the accident.

A. This is just exactly what I saw: I was up on the walk, the crosswalk, and I saw Galina going right behind—get right behind the bar and step over it and go down into the table. She sat on the edge of the table for a little while and, I don't know, she just slid off there on the floor.

I went ahead with my work and, all of a sudden, I saw Guy Smith go up there, and I looked up, and Galina was standing right by the side of her table. I watched—she looked awfully white and I went to her and said, "Galina, what is the matter?" She said, "I believe I tore my knee out of joint." I said, "You had better get out and go to the hospital." She said, "Guy has already gone to get somebody to take me to the hospital."

(Testimony of Anna Jeffries.)

When she got out of the place where she worked—we call it a pit—it was just “up and over.” She got up to the roll and throwed her leg over and come down, and when she come down she went way down on her right side and I said, “Galina, if you didn’t hurt your leg in there,” I said, “you have sure hurt it now.” She walked away towards the back of the building, limping. [278]

Mr. Powers: I believe that is all.

Recross Examination

By Mr. Sims:

Q. You say she came out over the roll?

A. Yes.

Q. Did you hear the testimony of Mr. Leacock that she went under the roll?

A. I heard that, sir.

Q. You think Ed is mistaken?

A. I honestly do, and I know——

Mr. Powers: I think the witness is not required to comment on the other witnesses’ testimony.

Q. (By Mr. Sims): Were these power-driven rolls? A. Yes, sir.

Q. You were using a truck to take this material from the rolls? A. Yes, sir.

Q. But you were not busy that night?

A. Well, I will tell you, we only had one cutter on duty on the cutoff. The rest of them were getting off—Number 9, I believe it was, and 10 and 11 was the scrap saw.

Q. You did not have four sawyers going that night on the cutoff saws?

A. No, and to my knowledge—— [279]

(Testimony of Anna Jeffries.)

Q. What, if any statement, was made there about Mrs. Smith having had trouble with her leg before? State the conversation.

A. There was just a few words exchanged between her and the foreman.

Q. What words?

A. When she came in—do you want me to repeat it?

Q. Yes.

A. The foreman said, “Well, were you attended to all right?” She said she was, and then she expressed a desire to work the rest of the shift, and he said, “Did your knee ever cause you any trouble before?” And she said, “Yes, I have had a lot of trouble with that knee.” [285]

MOTION BY DEFENDANT FOR ORDER DIRECTING JURY TO RETURN VERDICT IN FAVOR OF DEFENDANT

Mr. Powers: Comes now the defendant, if your Honor please, and moves the Court for an order directing the jury [287] to return a verdict in favor of the defendant on the grounds and for the following reasons:

First, that there is no evidence now in this case that the plaintiff jumped. She has not said this time that she had jumped in as she claims in her pleadings and as in the pre-trial order. She said she did not know how she got down into the pit. Obviously, if she got in, sliding off the table, there

would be no way here that the jury could return a verdict in favor of the plaintiff.

Secondly, it appears from the medical evidence that her condition could be the result of one or two or more causes;

And, third, that under the Employers' Liability Act of the State of Oregon, the Act here now, under the evidence, would not be violated as a matter of law for the Court to decide it is a perfectly simple thing for the plaintiff to get on the floor and, as admitted, she was not injured in connection with any machinery, any electricity, or any moving devices, and I believe we are entitled to a directed verdict.

(Argument of counsel.)

The Court: We will adjourn now until tomorrow morning.

(Thereupon at 5:30 P.M. an adjournment was taken until 9:30 A.M., December 5, 1946.)

(Court reconvened at 9:30 o'clock A.M., December 5, 1946, pursuant to adjournment.)

The Court: Mr. Powers, on your motion, I am going to reserve decision on it until after the verdict of the jury. I read this Barker case before. I reread it last night. There is no doubt but what it makes a material change in the law of the State under the Employers' Liability Act. It says that the question is not as to the general nature of the plaintiff's employment, as to whether that involves risk and danger, but whether the particular thing she was doing at the time involved risk and danger.

To make it apply to this case, there was a picture circulated here of the Shevlin-Hixon plant. Under the Barker case, employees in the office, like that gentleman in the back of the room who testified yesterday, doing clerical work, would not have the same rights under the Oregon Employers' Liability Act as a man riding a carriage. That distinction had not been previously maintained. The effect of this decision, without doubt, is to wipe out that early-day taxicab case where the taxi driver was hurt, while changing a tire.

Another kind of case that it wipes out is the case where the dishwasher was hurt and was allowed to recover because she was working in the same room, even though some distance from machinery. It wipes out another type of [289] case, like the one where the man was unloading hams from a Southern Pacific car, passing them from one man to another. In all of these cases the Act itself applied because of the general nature of the employment, because the general nature of the employment was hazardous.

The Employers' Liability Act has given everybody a good deal of trouble. There is no act quite like it, as far as I have found. As far as the Supreme Court decision in this particular case is concerned being the law of the case, the law of this case is what the courts of the State of Oregon say by way of interpreting the Liability Act. The Barker case, having come down after the Supreme Court decision, it must be given here, as well as by them, proper consideration, and I would think, with this case, it would be up to me, under the practice

as I understand it in the State courts, to determine as a matter of law whether or not the particular activity of the plaintiff came within the Liability Act. The Oregon Supreme Court, in the Barker case, determined that question as a matter of law, and these other cases that I have mentioned, and many others, have been determined as a matter of law.

It might be, that under normal circumstances, at this stage of this case I should determine, as a matter of law, whether or not this particular activity by this plaintiff, according to your theory, as the Supreme Court says [290] here, was inherently dangerous. That is not the doctrine of the Barker case. The words of the statute say that it must involve risk and danger, and the Court, in dealing with this motorman who got off ahead of the car to clear the switch, held that what he was doing at the time came within the Act and definitely declined to pass on whether or not the normal duties of a motorman came within the Act. They said that what he was doing was inherently dangerous.

So, applying that here, the question would be normally whether this plaintiff, according to her theory, went to work the way she says she had to do in getting down off the table, whether it was inherently dangerous in getting down off a 33- or 36-inch table in the way she said she was required to do it. I am going to submit that question to the jury whether or not getting down off the table, in order to get down to where she was working, was inherently dangerous, and I am going to take a verdict not only on

that, but generally, so your motion is provisionally denied. The question is reserved. Now, you may proceed.

(Argument by counsel for defendant to the jury; closing argument by counsel for plaintiff.)

(Recess.) [291]

COURT'S INSTRUCTIONS TO THE JURY

The jury was thereupon instructed by the Court, orally, as follows:

The Court—The first question in any case of this kind, Ladies and Gentlemen, is whether the plaintiff is entitled to recover from the defendant. It is always a good idea to consider that question first, because, if you conclude that the defendant is not liable, there would be no reason to go further in the case and plaintiffs, including this plaintiff, always have the burden of proof by a preponderance of the evidence, preponderance of the evidence meaning the greater weight of the evidence.

In this case, the plaintiff has charged defendant with a violation of the Oregon State Employers' Liability Act which provides that employers having charge or responsible for any work involving risk or danger to employees shall use every device, care and precaution which is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device and without regard to the additional cost of suitable material or safety appliances or devices. That is the general language of the Act.

In this case, plaintiff says that, to get down [292] to her work, she had to come to a table and she had to get down from that onto the floor level where she worked, and that she was required to jump down and that, as a result of jumping, she was injured.

At the outset, you must decide whether or not to give full effect to all that she says about it. You are the exclusive judges of the credibility of the witnesses and the weight or value of their testimony, including the testimony of the plaintiff. At the outset, you must decide whether that way of getting to her work involved inherent danger. To come under this Act, before plaintiff is entitled to recover, you must find, by a preponderance of the evidence, that that way of getting to her work involved inherent danger. Unless you are satisfied of that, by a preponderance of the evidence, plaintiff cannot recover.

If you are satisfied, by a preponderance of the evidence, that it involved inherent danger and that, as a proximate result of providing and requiring that method of getting to the work—"proximate" means direct cause—plaintiff was injured, then, there has been a violation of the statute and she is entitled to recover such damages as she suffered as a result of the failure to comply with the statute, less such sums as might be charged to her on account of her contributory negligence, if you find there was contributory negligence. [293]

What I mean by that is that defendant has denied all liability, but it is charged, aside from that, that plaintiff herself was contributorily negligent.

Negligence is the doing of some thing that the average, reasonable person would not do under simi-

lar circumstances, or the failure to do something that the average, reasonable person would do under the same or similar circumstances; and the defendant here says that, even though this should be found to be a violation of the statute—providing a way to get to her work—that she could got off the table in a different way and saved herself from being hurt, or reduced the amount of her damages. That is the defense that they have pleaded, aside from a denial of all liability.

As to that defense, the defendant has the burden of proof. Even though you find the defendant is liable, should you also find the plaintiff was guilty of contributory negligence in her own conduct, then, her damages would have to be reduced in the manner which I will describe to you in a few minutes.

Those are the basic issues in the case. Is defendant liable at all for a violation of the statute? If there is a violation of the statute, was plaintiff herself guilty of contributory negligence?

If you find that the plaintiff was injured, as a [294] result of a violation of the statute, by the defendant, she would be entitled to such sum as would fairly and reasonably compensate her for her damages which were proximately and directly caused by the violation of the statute, and which would include pain and suffering that she has had, loss of earnings, and such pain and suffering, if any, which she might be subject to in the future, loss of earnings, also, if any, in the future; and it also would include hospital and doctor bills which she may have. I do not remember the figure about

that. You will remember that testimony. And also including doctor and hospital bills, if any, which might be reasonable and necessary to be paid in the future. Her claim is for a maximum of \$7,000 for general damages and \$400 for special damages, the special damages being the medical and surgical operation and the \$7,000 being the maximum covering all other items of damage.

I do not think I need to say to you, Ladies and Gentlemen, you being the type of people that you are, that neither sympathy nor prejudice should influence you in arriving at your verdict. You are called here from all walks of life. You have sat on other cases. You must find your verdict under all the facts as presented and under the instruction that I give to you.

You will have a number of exhibits to consider. You will give them the weight that you feel they are entitled [295] to, along with the evidence that you have heard from the witness stand.

This case has been a little different from most cases, in that testimony of various witnesses has been read to you; for various reasons that we are not interested in at this time, the testimony of these witnesses was previously taken in that manner and offered to you by reading what they said at that time. You will give that testimony the same weight you would if those people were here, whatever weight you feel it is entitled to, along with the other evidence in the case. Of course, it is better to have the people here where we can see them and be able to judge as to what weight should be given to their testimony.

This case, like most cases, presents a conflict of testimony. You are going to have to choose between the stories told by the witnesses. Everything that has been said here cannot possibly be true. People's recollections are different. The interests people have have a lot to do with the way they testify. Those are matters that are peculiarly for your consideration. You will have to reconcile that testimony, in arriving at your verdict, which, by the way, must be unanimous, like all verdicts in this court. You will elect a foreman when you retire and he will sign your verdict.

I think I might say again that the first question [296] is whether or not the defendant is liable to the plaintiff. If you find that there has been a violation of the statute that proximately caused plaintiff's injuries, then plaintiff is entitled to recover. If you do not find liability as to the plaintiff, that ends the case and defendant is entitled to a verdict. If you do find liability, then it will be proper for you, in determining the amount of damages that plaintiff is entitled to, to consider along with that the question of contributory negligence, if you find there was contributory negligence. If you find there was contributory negligence, then that would reduce the amount you find she was entitled to, in proportion to her contributory negligence. The way we usually do that is in the form of percentages. Taking 100 per cent of the total of all negligence in the case, if the proportion of plaintiff's contributory negligence was 10 per cent of all negligence, then you should reduce the amount of the

verdict by 10 per cent. If the contributory negligence was larger than that, you would reduce the damages accordingly. In other words, contributory negligence is not a defense to this statute, but it should be taken into account in the amount of the verdict.

Do you want me to add anything before the jury retires? You may take your exceptions later.

Mr. Powers: No, I think your Honor has covered it, [297] unless your Honor wants to speak about whether the injury actually came from this condition.

Mr. Conway: We have nothing further, at this time, your Honor.

The Court: You may go upstairs, Ladies and Gentlemen. We will send the exhibits up in a few minutes. Do not begin to deliberate until the exhibits arrive.

(The Bailiffs were thereupon sworn.)

The Court: We have two forms of verdict, one a straight form for the defendant and the other with the amount of damages blank. That form, you will sign if you find for the plaintiff. Do not begin to deliberate until the exhibits are sent up to you.

(The jury thereupon retired at 11:28 A.M.)

PLAINTIFF'S EXCEPTIONS TO COURT'S INSTRUCTIONS

Mr. Conway: If the Court please, I notice under Rule 51 of the Rules of Civil Procedure, it pro-

vides that the Court shall inform counsel of its proposed action on the requested instructions prior to arguments to the jury, and I think probably the Court in this instance overlooked that particular situation, in that we did not have any opportunity to know what to say about some of these instructions or requests. I think, just for the purpose of the record, your Honor, we would like to have an exception. It was [298] evidently due to an inadvertence.

The Court: It was not through inadvertence. For the purpose of the record, I do not feel I am under any obligation to specifically discuss twenty-five or more requested instructions. That rule has its place and serves a useful purpose, but it cannot apply to all circumstances.

Mr. Conway: I did not have that in mind, your Honor. I was not criticizing that.

The Court: That is all right. You are entitled to criticize, but I am entitled to state my view of it.

Mr. Conway: I did not mean it the way your Honor thought. That is what I am getting at.

The Court: Sir.

Mr. Conway: I did not mean it the way you think. What I was getting at was that we were entitled to have a general idea as to how you were going to instruct. I did not mean specific requests. I appreciate you could not do that in this kind of a situation.

The Court: That means you advise the Court on all questions in the case. You people are personal injury lawyers. You try cases under this Act and

you try cases all the time. You know what the range is of possible instructions in these cases. The Act is just what it says it is. If there has been a violation of the Act which proximately results in damages, then it applies; if there is contributory negligence, [299] it is what the statute says.

Every now and then, somebody, just like you, trips me up a bit and says that they did not have full elucidation before they began to argue to the jury, as to what I was going to tell the jury. As I say, that rule has to be applied rather liberally and, unless counsel wishes to cite some particular regard in which they have been hampered in their argument to the jury, I just do not think that that is a valid objection. If you have some particular point, you and Mr. Sims, to cite wherein your argument to the jury has been handicapped by not knowing what I was going to say to the jury, have it put of record.

Mr. Conway: I might say this, in that connection, since your Honor has mentioned it: We did not know what you had in mind when you made the statement, before the argument this morning, about what you meant by "inherently dangerous," in regard to this particular operation; we did not know how you were going to instruct on that particular matter.

The case of Barker against Portland Traction Company, which Mr. Powers called your Honor's attention to yesterday afternoon when he made his motion for a directed verdict, in the October 1, 1946, Advance Sheets of the Supreme Court of Oregon,

intimates in the opinion that we are within our rights to still be within the interpretation [300] placed by the Circuit Court of Appeals in connection with this particular operation, to the effect that it does involve risk and danger.

Here is what I mean by that, your Honor: The Oregon Supreme Court, in this Barker case, at page 70 and page 71, says: "The Employers' Liability Act, as this Court has many times said, deals only with duties and employments which involve inherent risks and dangers. Duties and employments attended only with ordinary risks and dangers are unaffected by the Act. Since the plaintiff was not injured while aboard his streetcar, we have no occasion for determining whether the operation of street cars is within the protection of the Employers' Liability Act."

Then, they go on: "We neither express nor intimate any impression upon that subject. The plaintiff was injured while removing snow from a small area of the public street, and, as we have indicated, work of that kind is not inherently dangerous."

Continuing, on page 71: "We do not believe that the plaintiff's contention is warranted by any language of the Employers' Liability Act. Certainly no express provision of the Act extends its protective features to employees engaged in the performance of non-hazardous work. According to our interpretation of the Act, its protection is available only to (1) employments which are attended [301] with inherent risks and dangers, and (2) employments which are rendered hazardous through the

use of machinery, scaffolding, dangerous substances, electrical devices or other equipment and substances which are expressly enumerated in the Act. Any other construction of the Act would not only import into it a provision which is not there, but would grant to a streetcar operator, who occasionally cleans a switch, the protective features of the Act, and withhold them from the switchmen and greasers who daily work about the switches."

What I am trying to get at, your Honor, is, according to our contention in this case, this work is inherently dangerous, because it does involve risk and danger, by reason of the fact that this machinery is very close to the operating pit or trap, whatever you want to term it, where the plaintiff was required to work. She had this saw within two or three feet of her head or arm or shoulder, wherever it was, according to the evidence, and she also had these live rolls right alongside of the table where she was enclosed in this pit.

There was some testimony, also, your Honor, that showed the punks were afraid, some of them, to go over the rolls, because they thought it was dangerous to go over the rolls.

Then, we have these saws going back and forth, as the testimony shows. Suppose something happens to one of these saws and it flies off or falls off. That is very dangerous, inherently dangerous. That is our position here. That is what we mean by that, your Honor. That is our interpretation of what it means.

Now, the appellate court here has practically said that in its opinion, as I understand it. That

is what I meant, your Honor, by the statement that we did not intend what you mean, when you said you were going to tell them something about its being inherently dangerous.

The Court: No, I told you I was going to submit the question of fact whether this was inherently dangerous.

Mr. Conway: I mean, in our interpretation of what you were going to instruct. That is what I am getting at. We could not say anything about it in our argument.

The Court: Mr. Sims did the arguing.

Mr. Conway: Well, I know, but I know he did not have the scope of your instructions in mind. That is what I mean.

With reference to the requested instructions that we submitted to your Honor, just for the purpose of the record, I think we were entitled to an instruction to the effect that this work did involve risk and danger, and so forth. Under the evidence introduced in this case, I think we should have that instruction as a matter of law. That [303] is the substance of Requested Instruction No. 1. The reason for that is that we feel it is contrary to the facts and the law because that was not given.

Instruction No. 2 is to the effect that she injured her knee in jumping from the table to the floor, and we ask that, if the jury found she would not have done so had the company removed the rolls so she could have walked in there—we feel we were entitled to that instruction because of the circumstances here, your Honor.

With reference to Requested Instruction No. 3, we have no complaint. The same with No. 4. The same with No. 5.

With respect to Plaintiff's Requested Instruction No. 6, we respectfully requested that if the jury found that there was a violation of the Act, it would be negligence, in and of itself, or negligence per se. We think we were entitled to that, because that is the substance of the Appellate Court decision in this case at bar, also.

Then, Plaintiff's Requested Instruction No. 7, to the effect that the duty of the employer is absolute and non-delegable, and he must see that his directions are performed with reference to not jumping. In other words, the evidence of the foreman would indicate that he did not tell the plaintiff to jump, and we feel, under the decision of the Appellate Court here, that instruction should have [304] been given.

As to Requested Instruction No. 8, about the assumption of risk, we have no complaint on that.

With respect to Plaintiff's Requested Instruction No. 9, your Honor, that refers to providing a reasonably safe place to work and reasonably safe appliances with which to do the work. It was not given and we think we were entitled to that under the law.

Then, as to the Plaintiff's Requested Instruction No. 10, your Honor, that is the one with reference to the highest degree of care being required of the employer under the Employers' Liability Act. It is self-explanatory.

Plaintiff's Requested Instruction No. 11 is, briefly, that the defendant company failed to furnish employment which was safe and a safe place to work, and that it is up to the jury to find certain things contained in that requested instruction, in regard to that situation, and then, if there was a violation of that condition, as indicated, that would be a violation of the law, and so forth.

Then, Plaintiff's Requested Instruction No. 12 is to the effect that it would have been practicable to have provided a re-arrangement of the equipment so as to not be necessary for punks to enter their place of employment by jumping from the table top down to the floor or [305] crawling over the rolls. "If you find the defendant failed to do that, then you must find defendant was negligent." We except to the Court's failure to give that instruction, because we feel that is what the evidence shows and, therefore, it would be contrary to the law not to give that instruction.

Then, Requested Instruction No. 13, your Honor: We ask in that instruction whether or not the company could have done anything that they failed to do which would have prevented plaintiff from being hurt. That is the effect of it. The requested instruction has to do with whether there was a device or care or precaution that the company could have used or installed in making it needless for Mrs. Smith to have jumped and, if so, that should have been done—without impairing the efficiency of the machinery, of course. We think it is contrary to the law not to have given that instruction.

In regard to Plaintiff's Requested Instruction No. 14, if the jury found that the company, through its foreman, instructed Mrs. Smith to jump into the pit in connection with performing her duties and that she was injured as a result of obeying those instructions, then the jury must find that the company was negligent as a matter of law and it would be liable for all resulting damages to Mrs. Smith. We except to the failure of the [306] Court to give that instruction because it is contrary to the evidence and the law that it not be given.

With respect to Plaintiff's Requested Instruction No. 15, your Honor, with reference to the company requiring Mrs. Smith to work in a place to which the only ingress was by means of a 33-inch jump, and if she was injured as a result of performing her duties in that manner, the jury must find the company negligent as a matter of law, and that the company would then be liable for all resulting damages to Mrs. Smith. The failure to give that requested instruction is, we believe, contrary to the facts and the law involved here.

Plaintiff's Requested Instruction No. 16, your Honor, is similar to the previous instruction—excuse me, I am wrong. Requested Instruction No. 16 is under Section 5 of the Employers' Liability Act. We think we are entitled that under the Circuit Court of Appeals decision.

Plaintiff's Requested Instruction No. 17, your Honor, refers to another situation where the Act makes it plain that the duty upon the employer is absolute and non-delegable and continuing, inas-

much as the employer can in no way be absolved from liability by trying to delegate that duty to an employee and so forth, the purpose of the law being, namely, to protect the life and limb of the employee. We believe that situation is indicated here, because [307] she had to have a safe place in which to work at all times, and we except to the failure of the Court to give that requested instruction.

Plaintiff's Requested Instruction No. 18, that the jury be instructed that a punk, as a matter of law, is not one in charge or control of the work under the Employers' Liability Act. We feel the failure of the Court to give that instruction is contrary to the law and the facts here.

Then, Plaintiff's Requested Instruction No. 19: We ask in this requested instruction that your Honor instruct the jury that if they find there was a care and precaution that was not used by the company that was applicable to use, practicable, I should say, for the protection of Mrs. Smith and the employees generally and which, if used, would not have limited the efficiency of the operation and, if it had been used, would have protected Mrs. Smith from injury, the injuries which she suffered and does suffer, then the jury must find the defendant guilty of negligence, and we believe that is referred to in the opinion of the Appellate Court in this case, and that failure to give that instruction is contrary to the law involved.

Then, Plaintiff's Requested Instruction No. 20: We feel that the jury should know that the Em-

ployers' Liability Act was a remedial and definite step and should be liberally construed for the purpose of protecting workmen, and that it [308] is the purpose of the law to protect employees, including Mrs. Smith. We feel that the failure of the Court to give that instruction is contrary to the law involved here and the facts.

Plaintiff's Requested Instruction No. 21 is just a general instruction as to negligence and so forth, and we have no particular complaint about that.

Plaintiff's Requested Instruction No. 22: We felt, by reason of the fact that the evidence came in in the way it did, the jury might get the idea that because Mrs. Smith knew about danger and risk of her job that she assumed the risk when she continued to work there and we thought, if that were true, that the jury should know that that was eliminated under the law and that that could not be considered by the jury, and so forth. We feel that the failure of the Court to give that instruction is contrary to the law involved here and the facts adduced from the witness stand.

Plaintiff's Requested Instruction No. 23. We have no complaint on that because your Honor covered that situation.

Plaintiff's Requested Instruction No. 24 is to the effect that if the jury found as a fact that no one else had been injured, that does not excuse defendant from liability because this accident did occur. We think that instruction should have been given, because it is set out [309] on pages 9 and 10 in the Appellate Court's decision in this case.

We again refer to page 13 of the Appellate Court's opinion in this case. We believe Plaintiff's Requested Instruction No. 24 should have been given.

That, I believe, your Honor, is the gist of our exceptions for the record.

The Court: The objections will be noted and exceptions allowed.

Defendant's Exceptions to Court's Instructions

Mr. Powers: May it please the Court, the only exception we would ask is with respect to Requested Instruction No. 5 and No. 14, having to do with aggravation. There was some testimony by their doctor to the effect that the plaintiff has traumatic arthritis, and they make no claim at all in the complaint of any such condition, and we thought that should have been eliminated from the case.

Then, Requested Instruction No. 8, which follows that Barker case, which we felt the Court should have given, in withdrawing from the jury's consideration the provision of the Act respecting the machinery, because here the plaintiff was not injured by any machinery and does not claim to have been. Requested Instruction No. 6, which is to the effect that the employer is not required to have the most [310] modern or the newest methods, under the Act. We wish to except to those requested instructions.

The Court: The objections will be noted and exceptions allowed. Court is now in recess.

(Recess.)

(The jury returned into court at 4:10 o'clock P.M. with its verdict.)

The Court: Will you bring the verdict up, please?

The Foreman: Your Honor, before we bring this verdict in, may I ask you a question?

The Court: Let me see the verdict, first. (Verdict handed to the Court.)

The Foreman: Is it true that the figure asked the verdict in this case includes the \$400 special damages asked for by the plaintiff?

The Court: Ask that again.

The Foreman: Is it true that the figure asked for in the verdict——

The Court: Included in the verdict.

The Foreman: ——includes the special damages asked for by the plaintiff?

The Court: My answer to your question is that this is all the recovery the plaintiff can get.

The Foreman: Thank you.

The Court: That is really what I understand you to say. [311] Will you read this please, Mr. Clerk? It is signed by the foreman.

(The verdict was then read by the Clerk, awarding damages to plaintiff in the sum of \$5,900.)

The Court: Is that your verdict, Ladies and Gentlemen?

Jurors: It is, your Honor.

The Court: The verdict will be received and filed and judgment entered on the verdict.

(Adjournment.) [312]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Ira G. Holcomb, Court Reporter, hereby certify that on, to-wit, December 3, 4 and 5, 1946, I reported in shorthand the testimony and proceedings in the above-entitled cause and court; that I thereafter caused my said shorthand notes to be reduced to typewriting; and that the foregoing, consisting of pages numbered 1 to 312, both inclusive, constitutes a true, full and accurate transcript of my said shorthand notes, so taken as aforesaid.

Dated at Portland, Oregon, this 11th day of February, A.D. 1947.

IRA G. HOLCOMB,
Court Reporter. [313]

[Endorsed]: No. 11567. United States Circuit Court of Appeals for the Ninth Circuit. Shevlin-Hixon Company a corporation, Appellant, vs. Galina M. Smith, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed March 19, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11567

THE SHEVLIN-HIXON COMPANY,
a Corporation,

Appellant,

vs.

GALINA M. SMITH,

Appellee.

APPELLANT'S STATEMENT OF POINTS ON
WHICH IT INTENDS TO RELY ON AP-
PEAL AND APPELLANT'S DESIGNA-
TION OF PORTION OF RECORD TO BE
PRINTED ON APPEAL.

To the above named plaintiff-appellee, Galina M. Smith, and to E. U. Sims, Harry George, Jr., and John F. Conway, your attorneys:

You and each of you will please take notice that the said appellant, The Shevlin-Hixon Company, hereby adopts as its points on appeal the Statement of Points on Appeal appearing in the Transcript of the Record which has been certified to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit; and the appellant hereby designates the following portion of the record to be printed in this appeal:

1. Pretrial order formulating issues.
2. The verdict of the jury in the within cause,

dated December 6, 1946, and judgment entered thereon dated December 24, 1946.

3. Defendant's motion for judgment notwithstanding verdict and in the alternative as a motion for new trial, made on December 12, 1946.

4. Notice of appeal.

5. Statement of points to be relied on upon appeal.

The following portions from the transcript of testimony and proceedings had during trial:

6. The following portions of the testimony of the plaintiff, Galina M. Smith: beginning on page 187 and ending at the bottom of page 193; and again, beginning on page 203 with the words "I think there is no question," and ending on page 210.

7. The last Q. and A. of witness Curtis on page 56 of the transcript.

8. That portion of the testimony of witness Norton, beginning on page 59 with the Q., "How did you get in and out of these pits?" and ending with the first A. on page 60; and the following Q. and A. appearing on page 64:

Q. Do you know how the women who worked as punks were dressed? How did you dress, for instance?

A. All of the girls wore slacks or overalls.

9. That portion of the testimony of witness Wuthrich, beginning with the first Q. on page 126 and ending with the first A. on page 127; and again, with the Q. on page 132, "Getting down to where

you worked, you said you got down on your feet and then got down onto the floor?" and ending with the last A. on the same page.

10. The following portions of witness Long's testimony: Beginning with the last Q. on page 165, and ending with the first A. "Yes" on page 166.

11. The following testimony of the witness Hufstader: On page 178, beginning with next to the last Q. on that page, and ending with the first A. given on page 179.

12. That portion of the witness Guy Smith, beginning with the last Q. on page 243, and ending with the first A. given on page 244; and from the same witness, beginning with the second Q. asked on page 248 and ending with the third A. thereafter.

13. The following portions of witness Jeffries' testimony: Beginning with the first Q. asked on page 268, and ending with the last A. on direct examination on page 270; again, from the same witness, beginning near the bottom of page 277 with the words "You saw Mrs. Smith come back, after she went to the hospital?" and ending with the last A. on page 279.

14. That portion of witness Burkhart's testimony, beginning with the second Q. on page 285 and ending with the third A. given thereafter.

15. All testimony of the witness E. G. Chuinard, which begins on page 66 and ends on page 103.

16. That portion of the testimony of the witness Edward Leacock beginning with the first Q. on page 211 and ending with the words, "She said, 'To hell

with the lineup, I have hurt my knee,' ” near the top of page 216.

17. That portion of the testimony of witness Charles R. McClure, beginning on page 139 with the first Q. asked, and ending on page 140 with the answer, “It could not,” in the 7th line from the bottom of the page; and further testimony from the same witness, beginning with next to the last Q. on page 142 and ending with the last A. given on page 148.

18. Beginning near the bottom of page 287, with the words “Motion of defendant for order directing jury to return verdict in favor of defendant,” and ending on page 298 with the words “The jury thereupon retired at 11:28 a. m.”

19. Beginning on page 310 with the words “Defendants exceptions to court’s instructions,” and ending at the bottom of page 313.

20. This appellant’s statement of points on which it intends to rely on appeal, and designation of portions of record to be printed on appeal.

Dated this 3rd day of April, 1947.

/s/ J. C. VEAZIE,

/s/ JAMES ARTHUR POWERS,

/s/ ALFRED C. VEAZIE,

Attorneys for

Defendant-Appellant.

Due service of the foregoing Appellant’s Statement of Points on Which It Intends to Rely on Appeal and Appellant’s Designation of Portion of

Record to Be Printed on Appeal, is hereby admitted in Multnomah County, Oregon, this 3rd day of April, 1947, by receiving a copy thereof, duly certified to as such by Alfred C. Veazie, one of the attorneys for defendant-appellant.

/s/ HARRY GEORGE, JR.,
Of Attorneys for
Plaintiff-Appellee.

[Endorsed]: Filed April 5, 1947.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF RECORD HEREIN

To the above named defendant, Shevlin-Hixon Company, a corporation, and to J. C. Veazie, James Arthur Powers and Alfred C. Veazie, your attorneys:

You, and each of you, will please take notice that the above named appellee Galina M. Smith, being dissatisfied with the designation of record of and by appellant herein, hereby designates the following additional portions of the transcript of testimony and proceedings herein which are material for printing in the transcript of record herein, to-wit:

All of the testimony of the following witnesses from the said transcript of testimony and proceedings herein, to-wit:

J. D. Donovan, pages 2 to 20, inclusive, of said transcript.

Dr. Paul Woerner, pages 21 to 30, inclusive, of said transcript.

Dr. J. F. Hosch, pages 33 to 44, inclusive, of said transcript.

Hope H. Clark, pages 44 to 46, inclusive, of said transcript.

Laura Snodgrass, pages 46 to 47, inclusive, of said transcript.

Frances Hastings, pages 48 to 50, inclusive, of said transcript.

W. T. Curtis, pages 51 to 56, inclusive, of said transcript.

Beth Norton, pages 57 to 65, inclusive, and pages 104 to 120, inclusive, of said transcript.

Anna Belle McGrady Wuthrich, pages 121 to 135, inclusive, of said transcript.

Dr. Charles R. McClure, pages 137 to 142, inclusive, and also pages 148 to end of cross-examination on page 159, inclusive, of said transcript.

Clara Long, pages 161 to 171, inclusive, of said transcript.

Norval C. Hufstader, pages 172 to 181, inclusive, of said transcript.

Galina M. Smith, pages 187 to 210, inclusive, of said transcript.

Edward Leacock, pages 211 to 239, inclusive, of said transcript.

Guy Smith, pages 240 to 252, inclusive, of said transcript.

Also the following portions of transcript of testimony and proceedings relative to exhibits, to-wit:

Print all of pages 20, 21, 31, 32, 181, 182, 183, 184, 185 and 186; also instructions numbered 5, 6, 8 and 14 of the Instructions to the Jury as requested by defendant, which is part of the entire record herein.

Dated at Portland, Oregon, this 7th day of April, 1947.

/s/ JOHN F. CONWAY,
/s/ EMERSON U. SIMS,
/s/ HARRY GEORGE, JR.,

Attorneys for
Galina M. Smith,
Appellee herein.

State of Oregon,
County of Multnomah—ss.

Due service of the within Appellee's Designation of Additional Portions of the Record Herein, is hereby accepted in Multnomah County, State of Oregon, this 7th day of April, 1947, by receiving a copy thereof, duly certified to as such by John F. Conway, of Attorneys for Appellee.

/s/ ALFRED C. VEAZIE,
Of Attorneys for Appellant.

[Endorsed]: Filed April 9, 1947.

[Title of Circuit Court of Appeals and Cause.]

MOTION

Comes now The Shevlin-Hixon Company, Appellant in the above entitled cause, and respectfully moves for an order of this Court that the original exhibits in said cause need not be printed, but may be considered in their original form.

/s/ ALFRED C. VEAZIE,
Of Attorneys for Appellant.

Due service of the foregoing Motion is hereby admitted in Multnomah County, Oregon, this 9th day of April, 1947, by receiving a copy thereof, duly certified to as such, by Alfred C. Veazie, one of the attorneys for the appellant.

/s/ JOHN F. CONWAY,
Of Attorneys for Appellee.

So Ordered:

/s/ WILLIAM DENMAN,
United States Circuit Judge.